Supreme Court, U. S.
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78-1008

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-_____

MINDA SATTERWHITE, ET AL.,
Petitioners

v.

CITY OF GREENVILLE, TEXAS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MINDA SATTERWHITE, ET AL.,
Petitioners

v.

CITY OF GREENVILLE, TEXAS,
Respondent

PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

The Petitioner, Minda Satterwhite individually and in her representative capacity as the representative of the class of past, present, and prospective female employees of the City of Greenville, Texas respectfully submits this Application for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The order of the United States District Court for the Northern District of Texas dismissing the class action is

reproduced in Appendix A to the Petition for Writ of Certiorari. The Opinion of the district court is reported at 395 F.Supp. 698 (N.D. Tex. 1975). The Opinion of a panel of the Court of Appeals affirming the dismissal of petitioner's individual claim and reversing the dismissal of the class action is reported at 549 F.2d 347 (5th Cir. 1977). On rehearing, the majority remanded the class certification issue for findings of fact. (557 F.2d 414 (1977)). On rehearing en banc a majority of the Fifth Circuit held that, even if the denial of certification was erroneous, that error could not be corrected on appeal in this case because of the intervening decision as to the individual claim (578 F.2d 987 (1978)).

JURISDICTION

Judgment was entered by the Court of Appeals for the Fifth Circuit on August 23, 1978. On November 10, 1978, an order extending the time for filing a petition for writ of certiorari was extended to and including December 21, 1978. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) because the remand opinion of the Court of Appeals for the Fifth Circuit conflicts with decisions of other circuits and conflicts with prior decisions of this Court.

STATUTES AND FEDERAL RULES OF CIVIL PROCEDURE

This case involves application of Rule 23 of the Federal Rules of Civil Procedure to litigation under Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. Section 2000e *et seq.*

QUESTIONS PRESENTED FOR REVIEW

1. Did the failure, or refusal of the trial court to conduct an evidentiary hearing on the maintainability of this action as a class action, upon request, entitle petitioners to a remand for further proceedings rather than dismissal of the complaint?

2. Does the remedy of dismissal under the circumstances conflict with this Court's decision in *Cooper and Lybrand v. Livesay,* ____U.S.____ (1978) and *Gardner v. Westinghouse,* ____U.S.____ (1978)?

3. Does the opinion conflict with the opinions of other circuit courts?

STATEMENT OF THE CASE

Petitioner filed this case as a class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq,* alleging that the City of Greenville, Texas discriminated in the hiring, pay, and promotion of female employees on the basis of sex. Petitioner moved for an order certifying the action as a class action and in the prayer of the supporting brief requested a hearing. (Appendix B, pp. 7-8). The trial court, without conducting a hearing, denied certification. Subsequently, the district court tried petitioner's individual claim, and rejected it on the merits. *Satterwhite v. City of Greenville, Tx.,* 395 F.Supp. 698 (N.D. Tex. 1975).

A panel of the Fifth Circuit initially affirmed on the merits with respect to the individual claim, but reversed the denial of certification. (549 F.2d 347). On rehearing, the same panel, by a divided vote, vacated and remanded the class action issue for an evidentiary hearing. On

rehearing en banc, a divided en banc court held that petitioner is not a proper class representative because "she neither has claims typical of the members of the class nor has an adequate common interest or nexus with the class." The Court did not reach the issue of whether petitioner has standing to sue under Article III, Section 2 of the Constitution.

The facts are thoroughly set out in the reported opinions, except for the issue of whether petitioner requested a hearing on the motion to certify the class action. In the prayer of the supporting brief, petitioner requested, "that this Court order a hearing on the maintainability of this action as a class action, and issue a determination that this action is maintainable as a class action." (Appendix B, pp. 7, 8).

SUMMARY OF ARGUMENT

The Court of Appeals erred in dismissing the class action based upon an inadequate record of the existence of an ongoing controversy between the class and the City of Greenville, Texas, where the inadequate record was the result of the failure or refusal of the trial court, upon request, to conduct an evidentiary hearing.

The failure or refusal to conduct a hearing deprived petitioner of an opportunity to establish the existence of the class action or to develop a reviewable record for appeal. The dismissal of the class action by the Court of Appeals therefore conflicts with this Court's holding in *Cooper and Lybrand v. Livesay*, that the denial of certification is reviewable on appeal at the behest of the named representative.

The dismissal under the narrow facts of this cause is error because of the incorrect assumption that petitioner failed to request a hearing or, in the alternative, the dismissal is error, because the Court of Appeals incorrectly concluded that there is no ongoing controversy between the putative class and the City of Greenville, Texas.

The remedy of dismissal used by the Court of Appeals brings it in conflict with at least two other circuits.

THE COURT OF APPEALS ERRED IN DISMISSING THE CLASS ACTION

The Court of Appeals dismissed petitioner's appeal of the dismissal of the complaint, remanded the cause to the district court with instructions to vacate its order, and directed the district court to dismiss the complaint.

Although the opinion is confusing, it appears that the Court of Appeals dismissed the complaint on Rule 23 grounds. The Court held: "Whatever decision the district court should have reached in February, 1975, on the basis of appearances, Mrs. Satterwhite was not then and is not now an appropriate representative. As no other champion has come forward and as the uncertified class lacks the stake in the controversy that a previously certified class might possess under *Franks* and *Sosna* the class action must be dismissed." (578 F.2d 996).

The Court of Appeals erroneously concluded that the failure to hold an evidentiary hearing is harmless. The failure to conduct an evidentiary hearing is critical. Without an evidentiary hearing, petitioner was denied the opportunity to establish the existence of the class. The Court of Appeals apparently concluded from the absence of proof of a class that there is no class. The Court notes

"The grievances, if any, of these putative and unknown class members, are, as far as this record is concerned, wholly conjectural. Hence, we are constrained to decide what the panel was 'tempted' to conclude, 557 F.2d at 422: there is no controversy between the defendant and possible class members that may now properly be considered in this suit."

The failure to conduct an evidentiary hearing upon timely request is in conflict with the holding of this Court in *Livesay* and *Gardner*. If the issue of maintainability is fully reviewable, there must be a meaningful opportunity to develop a record.

The Court of Appeals noted that the failure to provide a hearing may go uncorrected but held that: "plaintiff had the opportunity to avoid that error by timely seeking a hearing." In fact, petitioner did request a hearing. In the prayer of the brief filed in support of the motion to certify the action, petitioner stated: "Plaintiff prays that this Court order a hearing on the issue of the maintainability of this action as a class action, and issue a determination that this action is maintainable as a class action." (Appendix G. pp. 7, 8); but the trial court failed or refused to conduct a hearing.

There is some authority that the trial court is required to conduct an evidentiary hearing even without a motion from counsel. *U.S. v. U.S. Steel Corp.*, (5th Cir. 1975) 520 F.2d 1043, 1053, *cert. den.*, 429 U.S. 817. In *Livesay and Gardner,* this Court held that a district court's determination that an action may not be maintained as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, is not a final decision within the meaning of 28 U.S.C. Section 1291; nor is

that determination immediately appealable under 28 U.S.C. Section 1292 (a)(1).

This Court noted in *Livesay* that "an order denying certification is subject to effective review after final judgment at the behest of the named plaintiff or intervening class members." This Court in support of the position adopted that the determination is not immediately reviewable noting that "if the record provides an inadequate basis for this determination, a remand for further factual development may be required."

In the instant cause the Court of Appeals faced with an inadequate record imposed the responsibility for that inadequacy upon petitioner, despite petitioner's active pursuit of the class claims and despite the trial court's failure upon request to either compel adequate discovery or to conduct an evidentiary hearing on the maintainability of the action as a class action.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS

At least three other circuits have been faced with the issue raised in this cause, and the remedies reached are in conflict.

In *Harold A. Goodman v. Schesinger,* F.2d, (1978) the Fourth Circuit Court of Appeals held that the district court acted prematurely in denying class certification and vacated the dismissal of the class action. The Court remanded the class action to the district court with instructions that the action be retained on the docket for a reasonable time. That Court specifically

noted in its analysis with regard to the remedy that its holding is contrary to the *Satterwhite* majority.

The Ninth Circuit in *Vun Cannon v. Breed*, 565 F.2d 1096 (1977) adopted the position that where the claims of a representative plaintiff become moot, there is no case or controversy, and therefore dismissed on standing grounds. The Sixth Circuit in *Shipp v. Memphis Area Office, Tennessee Department of Employment Security*, F.2d (1978) has apparently adopted the same position.

Although the en banc majority herein, specifically noted that it was not dismissing on Article III case or controversy grounds, it did, as pointed out above, indicate that there is no on-going controversy between the putative class and the City of Greenville, Texas.

PRAYER

In light of the importance of this conflict in the area of Title VII class action litigation, petitioners pray that the judgment of the Court of Appeals be reversed and that this action be remanded to the district court with instructions for an evidentiary hearing on the maintainability of this action as a class action and for a hearing on attorneys fees.

Respectfully submitted,

DAVES, MCCABE & CREWS
P. O. Box 1115
Tyler, Texas 75710
(214) 593-0184

By: _____
LARRY R. DAVES

CERTIFICATE OF SERVICE

I, Larry R. Daves, hereby certify that a true and correct copy of the foregoing has been on this the____ day of December, 1978, deposited in the U. S. Mail, postage prepaid, to Mr. John Andrew Martin, 3000 One Main Place, Dallas, Texas 75250, attorney for respondent.

All parties required to be served have been served.

_____
LARRY R. DAVES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MINDA SATTERWHITE, ON BEHALF OF
HERSELF AND OTHER SIMILARLY SITUATED,
Plaintiff

v.

CITY OF GREENVILLE, TEXAS
Defendant

CIVIL ACTION NO. CA 3-74-767 C

ORDER DENYING CLASS ACTION

Having heard oral argument, having examined all facts in the record, and having considered the briefs of both parties on the question of whether this cause should be maintained as a class action, the Court is of the opinion that Plaintiff's Motion for Class Action should be denied. that Defendant's Motion to Deny Class Action should be granted, and that this cause should not be maintained as a class action.

Therefore, pursuant to Federal Rule of Civil Procedure 23(c)(1), it is hereby ORDERED, ADJUDGED and DECREED that Plaintiff's Motion for Class Action is denied, that Defendant's Motion to Deny Class Action is granted, and that this cause cannot be maintained as a class action.

/s/ W. M. TAYLOR, JR.
W. M. Taylor, Jr.
Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MINDA SATTERWHITE, ON BEHALF OF
HERSELF AND OTHER SIMILARLY SITUATED,
Plaintiff

v.

CITY OF GREENVILLE, TEXAS
Defendant

CIVIL ACTION NO. CA 3-74-757 C

MOTION FOR CLASS ACTION
DETERMINATION

TO THE HONORABLE JUDGE OF SAID COURT:

Comes Now, Minda Satterwhite, Plaintiff in the above cause pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure and respectfully requests the court to certify this action as a class action and would direct the Court's attention to Plaintiff's Brief in Support of Motion for Class Action Determination.

Respectfully submitted,

LAW OFFICES OF
LARRY R. DAVES
P. O. Box 1115
TYLER, TEXAS 75701
(214) 593-0184

By: _____
LARRY R. DAVES
ATTORNEY FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MINDA SATTERWHITE, ON BEHALF OF
HERSELF AND OTHER SIMILARLY SITUATED,
Plaintiff

v.

CITY OF GREENVILLE, TEXAS
Defendant

CIVIL ACTION NO. CA 3-74-757 C

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION
FOR CLASS ACTION DETERMINATION

Law Offices of Larry R. Daves
P. O. Box 1115
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ATORNEY FOR PLAINTIFF

I.

STATEMENT OF FACTS

The representative plaintiff has filed this action alleging that defendant City of Greenville, Texas engages in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964, as amended. Municipalities and other subdivisions of the State became subject to the Civil Rights Act of 1964 effective March 24, 1972.

The representative plaintiff filed a charge of discrimination against defendant on or about October 27, 1972 with the Equal Employment Opportunities Commission alleging that defendant had refused to hire her as superintendent of the municipal airport despite her qualifications because of her sex.

Plaintiff brought this action as a class action on behalf of all prospective and present female employees of the City of Greenville alleging that defendant maintains sexually segregated job classifications and departments. This action has been brought pursuant to Rule 23 of the Federal Rules of Civil Procedure, as amended. A motion for Class Action Determination is being filed pursuant to Rule 23(c)(1) and discovery in the form of Plaintiff's First Interrogatories, has been commenced in support of plaintiff's substantive claims. This brief is filed pursuant to the Court's request at the pre-trial conference held December 17, 1974, in this cause.

II.

ARGUMENT

THIS ACTION IS MAINTAINABLE AS A CLASS ACTION PURSUANT TO RULE 23

1. THE STANDARD FOR DETERMINING WHETHER PLAINTIFF MAY MAINTAIN THIS ACTION AS A CLASS ACTION IS NOT WHETHER SHE WILL ULTIMATELY PREVAIL ON HER CLAIM

In *Huff v. N.D. Cass Company* 485 F.2d 710 (C.A. 5, 1973), the Fifth Circuit confronted the question of whether an action filed as a class action under Rule 23 alleging employing discrimination was maintainable as a class action where the trial court had made a preliminary determination that the single plaintiff representing the class was not entitled to relief on the merits of his individual claim. As to the right of the plaintiff to maintain the class action, the Court held that the standard for determining whether a plaintiff can maintain a class action is not whether he will ultimately prevail on his claim citing *Miller v. Mackey Int'l. Inc.* 452 F.2d 424 (CA5, 1971); *Johnson v. Georgia Highway Express, Inc.* 417 F.2d 1122 (CA5, 1969).

In *Huff,* the Circuit emphasized the public policy interests served in effectuating the goals of Title VII litigation in eliminating employment discrimination. The Court stated:

> The federal courts have a particularly vital role in cases such as this. To them alone Congress has assigned the power to enforce compliance with the

strictures against racial discrimination in employment under § 703(a) of Title VII.

When, as frequently is the case, the alleged discrimination has been practiced upon the plaintiff because he is a member of a class that is allegedly discriminated against, the court trying a Title VII suit bears a special responsibility in the public interest to resolve the employment dispute by determining the facts regardless of the individual plaintiff's position. . . .

Hutchings v. United States Indus. Inc. (2 EPD § 10,244) 428 F.2d 303, 310 (CA5, 1970).

The trial judge in a Title VII case bears a special responsibility in the public interest to resolve the employment dispute, for once the judicial machinery has been set in train, the proceeding takes on a public character in which remedies are devised to vindicate the policies of the Act, not merely to afford private relief to the employee. Id. at 311.

At the appellate level we have made clear that we give full scope to Title VII, recognizing, as we do, that employment discrimination is "one of the most deplorable forms of discrimination known to our society, for it deals not just with an individual's sharing in the 'outer benefits' of being an American citizen, but rather the ability to provide decently for one's family in a job or profession for which he qualifies and chooses,"[9] and recognizing also that racial discrimination which is by definition class discrimination,[10] is a particularly virulent form of employment discrimination, because it is generally both subtle and pervasive.[11] We have applied a broad approach to standing, stressing the individual's role as private attorney general taking on the mantle of the sovereign.[12]

In the case at hand the Court has indicated that he feels the Commission's finding of "no cause" to be sufficient cause to dismiss the class action. In *Huff*, the Circuit Court stated: "(i)t seems to us that a class plaintiff who otherwise meets the demands of 23(a) and (b) should not be found to be disqualified solely by an advance determination that his claim is predictably not a winning claim and that, therefore, he cannot adequately represent the class as mandated by 23(a)(4)."

2. RULE 23 IS TO BE GIVEN A LIBERAL INTERPRETAION.

Rule 23 of the Federal Rules of Civil Procedure was amended in 1966 to provide inpertinent part as follows:

(a) Prerequisities to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class had acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

The purpose of the revision was not to restrict in any way the class action mechanism but rather to allow the courts more leeway to continually shape the parameters of the class. *Arey v. Providence Hospital,* 51 F.R.D. 62 (D.C. D.C. 1972). In dealing with federal laws the effectiveness which may depend in large measure on the application of the class action device, courts have concluded that the interests of justice require that even in a doubtful case if error is to be committed it should be

in favor of allowing the class action. *Esplin v. Hirschi,* 402 F.2d 94 (C.A. 10 1968); *cert. den.* 394 U.S. 928, 89 S.Ct. 1194, 22 L.Ed.2d 459 (1969); *Kahan v. Rosenstiel,* 424 F.2d 161 (C.A. 3 1970), *cert. denied.* 398 U.S. 950, 90 S.Ct. 1870, 26 L.Ed. 290. See also *Alameda Oil Co. v. Ideal Basic Industries, Inc.,* 326 F.Supp. 98 (D.C. Colo. 1971); *Thomas v. Clarke,* 54 F.R.D. 245 (D. Minn. 1971); *Gerstle v. Continental Airlines, Inc.,* 50 F.R.D. 213 (D. Colo. 1970); *Rosenblatt v. Omega Equities Corp.,* 50 61 S.D. N.Y. 1970); *Berland v. Mack,* 48 F.R.D. 121 (S.D. N.Y. 1969). In fact, the United States Court of Appeals for the Fifth Circuit has precluded consideration of the merits in ruling on the propriety of maintaining an action as a class action, *Miller v. Mackey International, Inc.,* 452 F.2d 424 (C.A. 5, 1971), and has authorized the maintentance of a class action even where the representative plaintiff's individual claim is without merit. *Huff v. N.D. Cass Company,* 485 F.2d 710 (C.A. 5, Sept. 4, 1973).

3. THE REQUISITES OF RULE 23(a) ARE SATISFIED IN THIS ACTION.

Preliminarily, it should be pointed out that the plaintiff's efforts to obtain information to present to the Court in support of her Motion for Class Action Determination have been stymied by defendant's resistance to discovery. However, in response to Interrogatory No. 8, defendant has provided a list of all department heads of the City of Greenville. The City Manager, Director of Community Development, Director of Electric Utilities, Airport Superintendent and all Department heads are males. There are apparently no female employees in supervisory positions. Even without the requested information, plaintiff submits

that she can establish the propriety of maintaining this action as a class action. With respect to the numerosity requirement, plaintiff need not show the exact number of class members. *Gatling v. Butler,* 52 F.R.D. 335 (D. Minn. 71). Nor need the plaintiff demonstrate the impossibility of joinder. The impracticability requirement connotes no more than difficulty or inconvenience. *Hamis v. Palm Springs Alpine Estates, Inc.,* 329 F.2d 909, 913-914, (9th Cir. 1964); *Union Pacific Railroad Co. v. Woodahl,* 308 F.Supp. 1002, 1008 (D. Mont. 1970).

No numerical formula has been established for determining how many class members are needed before "the class is so numerous that joinder of all members is impracticable." Eighteen was sufficient in *Cypress v. Newport News General and Nonsectarian Hospital Association,* 375 F.2d 648 (C.A. 4, 1967). Twenty was sufficient in *Arkansas Ed. Ass'n. v. Board of Ed. of Porland Ark. School Dist.,* 446 F.2d 763 (C.A. 8, 1971). The class of past, prospective and present employees of the City of Greenville is so numerous that joinder is impracticable.

Plaintiff has alleged at least three common questions of law or fact common to the class: (1) Defendant hired a male who was less qualified than plaintiff; (2) Defendant maintains sexually segregated job classifications and departments; and (3) Defendant pays female employees less than it pays male employees for the same or similar work. The requirement of common questions of law or fact has been given a permissive application and it is not necessary for all questions in the litigation to be common. *Like v. Carter,* 448 F.2d 798 (C.A. 8, 1971).

Furthermore the requirement that the representative plaintiff's claims be typical of the claims of the class is

not a rigid requirement; there need not be an identical fact pattern. *Randle v. Swank,* 53 F.R.D. 577 (D.C. Ill. 1971). Nor must identical damages be shown. *Rodriquez v. Swank,* 318 F.Supp 289 (N.D. Ill. 1970) affirmed without opinion 403 U.S. 901, 91 S.Ct. 2202 (1971). The requirement that the representatives of the class have claims which are typical of the claims of the class has been construed to mean that the claims of the nominal plaintiff be representative of those of the members of the class whom he purports to represent and that he not have interests antagonistic to or in conflict with those he seeks to represent. *Cannon v. Texas Gulf Sulphur Co.,* 47 F.R.D. 60 (S.D. N.Y. 1969). A court suit alleging a violation of Title VII is by its nature a class action, as the evil sought to be ended is discrimination on the basis of a class characteristic. *Bowe v. Colgate-Palmolive Co.,* 416 F.2d 711 (C.A. 7, 1969). Obviously plaintiff presents factual and legal questions which are common to the class and to her individual claim, which claim is not antagonistic to nor in conflict with the claims of the class.

Generally, the requirement that the representative party will fairly and adequately protect the interests of the class have been thought to be satisfied where plaintiff's counsel is qualified, experienced and able to conduct the litigation, *Carpenter v. Hall,* 311 F.Supp. 1099 (S.D. Tex. 1970), and where the plaintiff is willing and able to prosecute the action vigorously. *Hohmann v. Packard Instrument Co., supra., Epstein v. Weiss,* 50 F.R.D. 387 (E.D. La. 1970). The number of representative plaintiffs is irrelevant *Green v. Wolf Corp.,* 406 F.2d 291 (C.A. 2, 1968), *Cert. den.* 395 U.S. 977, 89 S.Ct. 2131 (1969). The defendant has not challenged the competence of plaintiff's counsel.

It is respectfully submitted that the requisites set forth in subsection (a) of Rule 23 are satisfied in this action.

4. THE REQUIREMENTS OF RULE 23(b)(2) HAVE BEEN MET IN THIS ACTION.

Rule 23(b)(2) provides that a class action is appropriate when "the party opposing the class has acted or refused to act on grounds generally applicable to the lass," and the representative party is seeking "final injunctive relief or corresponding declaratory relief." Subdivision (b)(2) of Rule 23 was added in 1966 primarily to facilitate the bringing of class actions in the civil rights area. See Wright and Miller, Federal Practice and Procedure: Civil Section 1774.

The representative plaintiff has alleged that defendant "alleged that defendant has acted or refused to act on grounds generally applicable to the class" and the representative plaintiff is seeking "final injunctive relief." All that is required under this subsection is a showing that the defendant has acted in a consistent manner toward the class so that its actions show a pattern of activity. *Hicks v. Crown Zellerback Corp.*, 398 F.2d 496 (C.A. 5th, 1968). Certification under 23(b)(2) does not preclude a demand for monetary damages. *Robinson v. Lorillard Co.*, 444 F.2d 791 (C.A. 4, 1971).

Plaintiff expects the evidence to show that defendant maintains unlawful hiring, placement and job assignment practices which discriminate against female job applicants and employees as a class. It is respectfully submitted that the requisites set out in Rule 23(b)(2) have been satisfied.

WHEREFORE,

Plaintiff prays that this Court order a hearing on the issue of the maintainability of this action as a class action and issue a determination that this action is maintainable as a class action.

Respectfully submitted,

Law Offices of
LARRY R. DAVES
P. O. Box 1115
Tyler, Texas 75701

CERTIFICATE OF SERVICE

I, Larry R. Daves, hereby certify that a copy of the foregoing brief has been mailed certified return receipt requested to the Honorable John Martin, One Main Place, Dallas, Texas 75250 this 26th day of December, 1974.

LARRY R. DAVES

CA 3-74-767-C

SATTERWHITE, ET AL VS CITY OF GREENVILLE, TEXAS

DATE 1974	Page#	PROCEEDINGS -1-	Date Order Judgment N
Aug. 12	1-3	Filed COMPLAINT. Issued SUMMONS (1).	Doc.# 1
Aug 12	1-6	Filed PLAINTIFF'S FIRST INTERROGATORIES.	1-A
Aug. 14		Filed MARSHALS RETURN ON SUMMONS executed 8-15-74 by serving Jack DeBerry-City Manager of Greenville, Texas.	
Sep 6	7	Rec'd LETTER from John Andrew Martin confirming pltfs' attorney consented to extension for answer date to and including Monday, Sept. 23, 1974 (cy ref to WMTJr)	2
Sept. 23	8-10	Filed Defendant's ANSWER.	3
Sept. 27	11-15	Filed Defendant's ANSWERS AND RESPONSES TO PLAINTIFF'S FIRST INTERROGATORIES, by Olan G. Steele-representative for City of Greenville, Texas.	4
Dec. 12	16-17	Filed Plaintiff's MOTION TO COMPEL DISCOVERY.	5
Dec. 26	18-27	Filed Pltf's MOTION FOR CLASS ACTION DETERMINATION with attached Brief.	6
1975			
Jan. 17	28-30	Filed AFFIDAVIT of Cameron McKinney.	7
Jan. 17	31-42	Filed DEFENDANT'S REPLY TO PLAINTIFF'S CLASS ACTION MEMORANDUM.	8
Jan. 30	43	Filed Defendant's MOTION TO DENY CLASS ACTION.	9
Feb 4	44	Filed ORDER DENYING CLASS ACTION (...pltf's motion for class action is denied ... that deft's motion to deny class action is granted...and that this cause cannot be maintained as a class action) Cys mld to counsel	10 WMTJr
Feb. 11	45	Filed Plaintiff's NOTICE OF APPEAL from the order denying the class action entered in this action on 2-4-75.	11
Feb. 18	46	Filed letter that plaintiff no longer desires to appeal.	12
Mar 26	47-49	Filed STIPULATION OF UNCONTESTED FACTS	13
Apr. 10	50-63	Filed POST TRIAL BRIEF OF DEFENDANT.	14
Apr. 23	64	Filed DEFENDANT'S MOTION FOR JUDGMENT.	15
Apr. 25	65-69	Filed POST TRIAL BRIEF OF PLAINTIFF.	16
May 1	70-73	Filed Defendant's letter brief.	17
Jun 18	74-78	Filed OPINION (deft's atty requested to prepare and submit appropriate order) Cys mld by Judge Taylor's office to counsel of record	18 WMTJr
Jun 23	79	Filed JUDGMENT after trial by the court (right to proceed as class action is denied...that pltf take nothing against deft and all costs of suit taxed against pltf) Cys mld to counsel	19 WMTJr

Cont'd. on -2-

D.C. 110 Rev. Civil Docket Continuation

Page # Doc.#5

DATE 1975	PROCEEDINGS	Date Ord Judgment
July 21	80 Filed Plaintiff's NOTICE OF APPEAL from the final judgment entered in this action of June 23, 1975. (Mailed copy of docket sheet and NOTICE to 5th Circuit this date.)	20 WMT
July 22	81-83 Filed Plaintiff's MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS, affidavit attached.	21
July 23	84-85 Filed Plaintiff's CASH BOND FOR APPEAL. ($250.00 cash)	22
Jul 28	86-87 Filed ORDER DENYING LEAVE TO APPEAL IN FORMA PAUPERIS Cys mld to counsel	23 WMTJr
Sep 2	Filed Transcript of Proceedings held March 26, 1975 with listed exhibits: Doc.# 24-A PX-1, 4 & 6 24-B DX-1 thru 6	24
Sep 2	Mailed original case papers with Transcript of Proceedings and exhibits.	

Supreme Court, U. S.
FILED
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SUPPLEMENTAL APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-~~_____~~ 78-1008

MINDA SATTERWHITE, ET AL.,
Petitioners

v.

CITY OF GREENVILLE, TEXAS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

MINDA SATTERWHITE,
on behalf of herself and others similarly situated

v.

CITY OF GREENVILLE, TEXAS.

NO. CA 3-74-767-C.

UNITED STATES DISTRICT COURT,

N.D. Texas,

Dallas Division.

June 18, 1975.

Female applicant who was not hired as the manager of municipal airport filed sex discrimination suit under title VII of the Civil Rights Act of 1964. The District Court, William M. Taylor, Jr., Chief Judge, held that the city, in refusing to hire plaintiff, whose husband was both a prime user and tenant of the airport, so as to avoid violating a provision of its charter relating to conflicts of interest committed no sex discrimination proscribed by Title VII.

Judgment for defendant.

Larry R. Daves, Tyler, Tex., for plaintiff.

John Andrew Martin, Carrington, Coleman, Sloman, Johnson & Blumenthal, Dallas, Tex., for defendant.

OPINION

WILLIAM M. TAYLOR, Jr., Chief Judge.

[1] This case presents the perplexing issue of whether a municipal employer who refuses to hire a female applicant as its airport manager to avoid violating a provision of its city charter relating to conflict of interests has committed sexual discrimination proscribed by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*. In the context of the facts of this case, this issue must be answered in the negative.

I. *Facts*

In October 1972, Minda Satterwhite, plaintiff herein, applied to the City of Greenville, Texas, defendant herein, for hire as the defendant's muncipal airport manager. Both prior and subsequent to this application, the plaintiff's husband was a prime user[1] of this airport facility. During the plaintiff's interview, the defendant's Community Developments Manager confronted Ms. Satterwhite with the potential conflict of interest posed by a wife supervising the operation of a municipal facility of which her husband was both a prime user and tenant. The day following this interview, the Community Developments Manager informed Ms. Satterwhite that her application had been rejected because of her conflict of interest[2] and a male applicant had been retained in the airport manager position.

1. Mr. John Satterwhite was the owner of a flight training school and aircraft charter and rental service, which had its operations based at the Greenville Municipal Airport.

2. Sec. 134. Personal interest.
No member of the council or any officer or employee of the city shall have a financial interest direct or indirect or by reason of ownership of stock in any corporation, in any contract with the city, or be financially interested directly or indirectly in the sale to the city of any land, materials, supplies, or services except on behalf of the city as an officer or employee; provided, however, that the provisions of this section shall only be applicable when the stock owned by the officer or employee exceeds one per cent (1%) of the total capital stock of the corporation. Any wilful violation of this section shall constitute malfeasance in office and any officer or employee guilty thereof shall thereby forfeit the office or position. Any violation of this section with the knowledge express or implied of the person or corporation contracting with the governing body of the city shall render the contract voidable by the city manager or council.
Greenville, Tex., Code § 134 (19____).

Contrary to the plaintiff's allegations, evidence adduced during the trial of this cause established this male-hiree to be at least as well qualified for the contested position as was Ms. Satterwhite.

On October 30, 1972, the plaintiff filed a charge of discrimination against the defendant with the Equal Employment Opportunity Commission (E.E.O.C.). The E.E.O.C. entered a determination concluding that there was not reasonable cause to believe that Title VII had been violated in the manner alleged by the plaintiff. Ms. Satterwhite was issued a Notice of Right to Sue, whereupon she instituted the instant lawsuit alleging sex discrimination. The plaintiff sought to prosecute this action on behalf of both herself individually and a class of present and prospective female employees of the City of Greenville. Fed. R. Civ. P. 23(b)(2).

II. *The Individual Claim*

The Supreme Court clarified the proper order and allocation of proof governing the disposition of a Title VII action challenging employment discrimination in

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

[2, 3] According to *McDonnell Douglas,* it is incumbent upon a Title VII complainant to carry the initial burden of establishing a prima facie case of discrimination. The Supreme Court prescribed four elements which are necessary to present a prima facie case. The plaintiff must show (I) that she belongs to a minority; (II) that she applied and was qualified for the job of airport manager for which the defendant was seeking applicants; (III) that, despite her qualifications, she was rejected, and (IV) that, after her rejection, the position remained open and the defendant-employer continued to seek applicants from persons of the plaintiff's qualifications.

[4] When confronted with such a prima facie case of employment discrimination, the burden then shifts to the employer to establish some legitimate non-discriminatory reason for the refusal to hire. Such a reasonable basis for rejection suffices to rebut the prima facie case.

[5] When her prima facie case is rebutted, the plaintiff must be accorded an opportunity to demonstrate by competent evidence that the presumptively valid reasons for her rejection were in fact a "pretext" or a "coverup" for a racially discriminatory decision.

[6] Applying the *McDonnell Douglas* standard to the facts of the instant case, the court has a grave reservation as to whether Ms. Satterwhite has even presented a prima facie case. A prima facie case requires that after the plaintiff's rejection, the position *continue* to remain open and that the defendant *continue* to review applicants of the plaintiff's qualifications. Here, one day after Ms.

Satterwhite's interview, her application was rejected and a qualified male applicant, whose interview preceded the plaintiff's, was hired. While the court appreciates that these prima facie elements are not inflexible requirements to be applied in every case regardless of its facts,[3] they nonetheless provide persuasive guidelines for ascertaining whether a Title VII complainant has satisfied his initial burden of proof.

Even if Ms. Satterwhite had presented a prima facie case, she has failed to prove that the defendant's reason for refusing to hire her was a "pretext" or "coverup" for an unlawful employment decision. The defendant contended that Ms. Satterwhite's application was rejected because her employment would have been counter to the City's codified policy against hiring personnel whose personal interests may conflict with their duties on behalf of the City. Towards showing this reason to be a "pretext" the plaintiff proffered statistical evidence in the form of the defendant's employment rolls. This exhibit was claimed to establish a general policy on behalf of the City of hiring female employees primarily in clerical or lower echelon administrative positions. This stastical showing is unpersuasive when measured against the City's compelling reason for not hiring the plaintiff. The plaintiff could have better served her case by presenting evidence, if any existed, of male employees who were hired by the defendant despite their having "conflicts of interest" similar to Ms. Satterwhite's.

Ms. Satterwhite's employment application presented a dilemma to the City. It could elect either to reject her application as conflicting with its city charter and expose

3. *See* 411 U.S. at 802, N. 13, 93 S.Ct. 1817.

itself to a potential charge of sex discrimination, or it could hire her and face the ramifications of violating its own published policy. It is the court's conclusion that the defendant acted upon Ms. Satterwhite's bid for employment in exactly the same manner it would have acted upon any other application, regardless of whether it be from a male or female. The defendant's rejection of the plaintiff's employment application was not discriminatorily motivated.

III. *The Class Action*

In her complaint, the plaintiff sought to represent a class comprised of present and prospective female employees, who the plaintiff alleged to be victims of the defendant's (1) discriminatory hiring policy, (2) sexually segregated job classifications and departments, and (3) discriminatory compensation scheme.

At the pretrial of this case, it appeared the plaintiff's claim was of questionable merit since the main question had to do with whether or not employment of plaintiff as airport manager would create a conflict of interest. This court is fully aware of the Fifth Court's admonition in Huff v. N. D. Cass Company of Alabama, 485 F.2d 710 (5th Cir. 1973), that the standard for determining whether a plaintiff may maintain a class action is not whether that plaintiff will ultimately prevail on the individual claim. There remained the question as to whether or not the questions of law or fact were common to the class and whether or not plaintiff's claim was typical of the claims or defenses of the class, as well as whether or not plaintiff would fairly and adequately protect the interests of the class. In this case also was the question as to whether or not the City had acted or

refused to act insofar as plaintiff was concerned on grounds generally applicable to the class. While the class action rule has value, unrestricted use can produce abuses. The defendant City in this case could well have been exposed to needless substantial expense.

[7] The Court has refused to permit this case to proceed as a class action mainly upon the ground that plaintiff has failed to establish a "nexus" because the conflict of interest issue unique to this case vitiates both the commonality of law and fact questions and the typicality of the claims and defenses. Fed. R. Civ. P. 23(a)(2) and 23(a)(3). Wells v. Ramsay, Scarlett and Company, Inc., et al, 506 F.2d 436 (5th Cir. 1975).

What the Supreme Court of the United States said in Blue Chip Stamps, et al, v. Manor Drug Stores, ____U.S. ____, 95 S.Ct. 1917, 44 L.Ed.2d 539 on June 9, 1975, in regard to "strike" or nuisance actions, abuse of liberal discovery provisions of the federal rules, "representing an *in terrorem* increment of the settlement value" is particularly pertinent in this case as well as in many actions where the plaintiff seeks to represent a class.

Defendant's attorney is requested to prepare and submit appropriate order.

APPENDIX B

MINDA SATTERWHITE,
on behalf of herself and others similarly situated,
Plaintiffs-Appellants,

v.

CITY OF GREENVILLE, TEXAS,
Defendant-Appellee.

No. 75-3377.

UNITED STATES COURT OF APPEALS,
Fifth Circuit.

March 24, 1977.

Female applicant who was not hired as manager of municipal airport filed a suit charging sex discrimination individually and on behalf of class of present and prospective female employees of city. The United States District Court for the Northern District of Texas, at Dallas, William M. Taylor, Jr., Chief Judge, 395 F.Supp. 698, entered judgment holding that city in refusing to hire plaintiff because of conflict of interest committed no sex discrimination and that she could not proceed with a class action, and the plaintiff appealed. The Court of Appeals, Godbold, Circuit Judge, held that the proper holding that the denial of airport job to plaintiff because of conflict of interest which may have been unique was not sex discrimination did not cause the position or plaintiff's claim to be atypical and preclude her from maintenance of class action.

Larry R. Daves, Tyler, Tex., for plaintiffs-appellants.

John A. Martin, Rod Phelan, Dallas, Tex., for defendant-appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before GODBOLD, SIMPSON and GEE, Circuit Judges.

GODBOLD, Circuit Judge:

Plaintiff, a female, applied for the job as manager of the Greenville, Texas, airport. The city denied her the job because of a potential conflict of interest arising from her husband's being a tenant and the primary user of the airport. A man was employed for the job.

Plaintiff filed this Tit. VII suit on behalf of herself individually and a class of present and prospective female employees of the city who are victims of its (1) discriminatory hiring policy, (2) sexually segregated job classifications, and (3) discriminatory compensation scheme. Following a hearing on the merits, the court found for the city on plaintiff's individual claim and denied her the right to proceed with a class action. We affirm the former, reverse the latter.

[1] The trial court refused to allow the class action to proceed, "mainly upon the ground that plaintiff has failed to etsablish a 'nexus' because the conflict of interest issue unique to this case vitiates both the commonality of law and fact questions and the typicality of the claims and defenses." The trial court seemed to be saying that because the city has a valid affirmative defense to Satterwhite's individual claim of sex discrimination she is not

representative of the class. The conflict of interest did not preclude plaintiff's membership in the class. In *Huff v. N. D. Cass Company of Alabama,* 485 F.2d 710 (CA5, 1973) (*en banc*), this court held:

> . . . a class plaintiff who otherwise meets the demands of 23(a) and (b) should not be found to be disqualified solely by an advance determination that his claim is predictably not a winning claim and that, therefore, he cannot adequately represent the class as mandated by 23(a)(4).

Id. at 714 (footnote omitted).

[2] Rule 23(a) requires that in order for one to bring suit on behalf of a class the following criteria be satisfied: (1) numerosity of class, (2) common questions of law or fact, (3) typicality of claims or defenses, and (4) plaintiff will fairly and adequately represent the class. The trial court singled out numbers two and three, above, as being deficient. Plaintiff is indisputably a female who applied for a management position with the city and was denied. Her position is analogous to that of the plaintiff in *Long v. Sapp,* 502 F.2d 34 (CA5, 1974), wherein the court stated:

> Having shown herself to be black and a former employee, albeit lawfully discharged, she [the plaintiff] occupies the position of one she says is suffering from the alleged discrimination. She has demonstrated the necessary nexus with the proposed class for membership therein.

Id. at 43. *See,* Wright and Miller, Federal Practice and Procedure, §§ 1763-64 (1972) ("Plaintiff has satisfied

Rule 23(a)(3) if the claims and defenses of the representatives and the members of the class . . . are based on the same legal or remedial theory." *Id.,* at § 1764, (1976, (1976 Pocket Part)). The reason for denial of the airport job to plaintiff, adverse interest, may have been unique, but this does not cause the position or plaintiff's claim to be atypical. *Huff v. Cass, supra.*

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX C

MINDA SATTERWHITE on behalf of herself and others similarly situated, *Plaintiffs-Appellants,*

v.

CITY OF GREENVILLE, TEXAS,
Defendant-Appellee.

NO. 75-3377.

UNITED STATES COURT OF APPEALS,
Fifth Circuit.

August 12, 1977.

Rehearing En Banc Granted

November 1, 1977.

Female applicant who was not hired as manager of municipal airport filed sex discrimination suit individually and on behalf of class of present and prospective female employees of city. The United States District Court for the Northern District of Texas, at Dallas, William M. Taylor, Jr., Chief Judge, 395 F.Supp. 698, entered judgment for city, and plaintiff appealed. The Court of Appeals, 549 F.2d 347, held that although the named plaintiff's individual sex discrimination claim had failed, she could proceed with her class action on behalf of present and prospective female employees of the city allegedly victimized by a discriminatory hiring policy, sexually segregated job classifications, and a discriminatory compensation scheme. On petition of the city for rehearing,

the Court of Appeals, Godbold, Circuit Judge, held that in respect to the city's claim that the prior decision violated the "case or controversy" requirement of article III of the Federal Constitution, remand of the case was necessary for factual determinations by the District Court, after evidentiary hearing, as to whether (1) plaintiff had satisfied the four requirements of class action rule 23(a) as of the date, before trial, on which class certification was denied, (2) if so, upon her dismissal from the case, whether the class members retained sufficient interest to serve as article III plaintiffs, and (3) if they did, whether plaintiff could justify her representation of their interests.

Petition for rehearing granted, prior opinion withdrawn; case affirmed in part, reversed in part, and remanded for further proceedings.

Gee, Circuit Judge, filed a dissenting opinion.

Larry R. Daves, Tyler, Tex., for plaintiffs-appellants.

John A. Martin, Rod Phelan, Dallas, Tex., for defendant-appellee.

Appeal from the United States District Court for the Northern District of Texas.

ON PETITION FOR REHEARING

Before GODBOLD, SIMPSON and GEE, Circuit Judges.

GODBOLD, Circuit Judge.

The city of Greenville has petitioned for a rehearing of our determination that, although the named plaintiff's individual sex discrimination claim has failed, she can proceed with her class action on behalf of present and

prospective female employees of the city allegedly victimized by (1) a discriminatory hiring policy, (2) sexually segregated job classifications and (3) discriminatory compensation scheme. The city now claims that our decision violates the case or controversy requirement of Article III of the United States Constitution. We did not confront this question in *Huff v. N.D. Cass Co.*, 485 F.2d 710 (CA5, 1973) (en banc), a case relied upon in our prior opinion.[1] To resolve the troublesome question about Article III and its relationship to the issue of certification of a class under Rule 23, we grant the petition and withdraw that part of our prior opinion concerning the class question.[2]

Two recent cases from the Supreme Court provide our starting point, *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), and *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976).[3] These cases have shifted the emphasis from whether the named plaintiff in a class action maintains the requisite "personal stake in the outcome"[4] to whether, after the named plaintiff's claim no

1. The *Huff* opinion did make one reference to taking a broad approach to "standing" in Title VII cases, stressing the public nature of the rights enforced by private citizens. 485 F.2d at 714 & n. 12. But *Huff* did not address the constitutional problems of standing or mootness.

2. We adhere to that portion of our opinion, unchallenged here, affirming the dismissal of Mrs. Satterwhite's individual clam of discrimination regarding the airport manager position.

3. Dictum in the recent case of *East Texas Motor Freight System, Inc. v. Rodriguez*, ____U.S.____, ____ n. 12, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977), reaffirms the approach taken by *Sosna* and *Franks*.

4. *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed. 2d 663, 678 (1962).

longer[5] exists, the class has acquired such a personal stake. *Developments in the Law—Class Actions*, 89 Harv. L.Rev. 1318, 1463-66 (1976).

Sosna was a challenge to a durational residency requirement for divorce. The three-judge trial court had certified the class action pursuant to F.R.Civ.P. 23(c)(1). By the time her case reached the Supreme Court however, the named plaintiff-representative had mooted her case by satisfying the one-year requirement. The Court first noted that certification of the class, by invoking res judicata policies[6] and requiring special court supervision,[7] bestowed a legal status on the class separate from that of Mrs. Sosna. As a result, certification "significantly affect[ed]" the case or controversy question. 419 U.S. at 399, 95 S.Ct. at 557, 42 L.Ed.2d at 540. It was not dispositive, however, because Justice Rehnquist then proceeded to analyze the facts of the case to determine whether a live controversy still remained—*i.e.*, between

5. *Cf.* cases where the plaintiff never had individual standing even at the outset of the litigation. *O'Shea v. Littleton*, 414 U.S. 488, 494-95, 94 S.Ct. 669, 675, 38 L.Ed.2d 674, 682-83 (1974); *Bailey v. Patterson*, 369 U.S. 31, 32-33, 82 S.Ct. 549, 550, 7 L.Ed. 2d 512, 514 (1962) (per curiam). *Compare* Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 Duke L.J. 573, 578-79, 583-84, *with Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1466-70 (1976), and *East Texas Motor Freight System, Inc. v. Rodriguez*, ____U.S.____, ____-____, 97 S.Ct. 1891, 1896-98, 52 L.Ed.2d 453, 462-63 (1977).

6. After certification, a judgment on the merits will bind all those who have been found to be class members at the time of certification. F. R. Civ. P. 23(c)(3); 419 U.S. at 399 n. 8, 95 S.Ct. at 557 n. 8, 42 L.Ed.2d at 540 n. 8.

7. Once the action is certified, settlement or dismissal requires the court's approval. F. R. Civ. P. 23(e); 419 U.S. at 399 n. 8, 95 S.Ct. at 557 at n. 8, 42 L.Ed.2d at 540 n. 8.

the class and the state of Iowa. Because, as to the class, the constitutional infringement alleged was "capable of repetition, yet evading review", the Court held that the class satisfied the case or controversy requirement even though Mrs. Sosna no longer did. Finally, having held Article III to be no bar to the class action, Justice Rehnquist in effect reevaluated the Rule 23(a)(4) adequacy of representation issue in light of Mrs. Sosna's departure from the case. In doing so, he made clear that this analysis was independant of the Article III issue:

> This conclusion [that Article III is satisfied] does not automatically establish that appellant is entitled to litigate the interests of the class she seeks to represent, but it does shift the focus of examination from the elements of justiciability to the ability of the named representative to 'fairly and adequately protect the interests of the class.' Rule 23(a). Since it is contemplated that all members of the class will be bound by the ultimate ruling on the merits, Rule 23(c)(3), the district court must assure itself that the named representative will adequately protect the interests of the class. In the present suit, where it is unlikely that segments of the class appellant represents would have interests conflicting with those she has sought to advance, and where the interests of that class have been competently urged at each level of the proceeding, we believe that the test of Rule 23(a) is met.

419 U.S. at 403, 95 S.Ct. at 559, 42 L.Ed.2d at 542-43 (footnote omitted).[8]

8. One student author had earlier urged a similar bifurcation of justiciability and representation questions. See the comment cited in note 5 *supra*, at 597-98, 602-08.

Franks continued the emphasis on certification established in *Sosna*[9] and stressed that "capable of repetition yet evading review" was not an essential element of the Article III analysis of that earlier case. *Franks* was a Title VII racial discrimination suit in which the particular subclass of truck driver applicants had sought hiring, backpay, and a retroactive award of seniority. The sole named representative of this subclass, however, had been hired, given backpay, and then subsequently properly discharged for cause. As to the sole issue of retroactive seniority that was before the Supreme Court, his claim was moot since he no longer had a job. However, once again the Court found an Article III case or controversy between the defendant and the certified subclass. Restating the *Sosna* rule, Justice Brennan first noted that the subclass of drivers had been certified. He then gave guidance as to how the courts should answer the second question of whether the class members remaining hold a personal stake in the outcome of the controversy:

> Given a properly certified class action, *Sosna* contemplates that mootness turns on whether, in the specific circumstances of the given case at the time it is before this Court, an adversary relationship sufficient to fulfill this function exists. In this case, that adversary relationship obviously obtained as to

9. *See also Board of School Comm'rs v. Jacobs*, 420 U.S. 128, 129, 95 S.Ct. 848, 849, 43 L.Ed.2d 74, 78, (1975), a post-*Sosna* case. Justice Brennan later indicated in *Franks* that the Court in *Jacobs* had also viewed certification as a prerequisite to the existence of a case or controversy involving the class. "As the action [in *Jacobs*] had not been properly certified as a class action by the District Court, we held it moot." *Franks*, 424 U.S. at 754 n. 6, 96 S.Ct. at 1259, 47 L.Ed.2d at 455 n. 6. The recent *Rodriguez* decision also suggests that certification is the appropriate starting point in cases such as ours, _____U.S. at _____ n. 12, 97 S.Ct. 1891 (dictum). See discussion *infra*.

unnamed class members with respect to the underlying cause of action and also continues to obtain as respects their assertion that the relief they have received in entitlement to consideration for hiring and backpay is inadequate without further award of entitlement to seniority benefits. This becomes crystal clear upon examination of the circumstances and the record of this case.

> The unnamed members of the class involved are identifiable individuals, individually named in the record. Some have already availed themselves of the hiring relief ordered by the District Court and are presently employed as OTR drivers by Bowman. Tr. of Oral Arg. 23. The conditions of that employment are now and so far as can be foreseen will continue to be partially a function of their status in the seniority system. The rights of other members of the class to employment under the District Court's orders are currently the subject of further litigation in that court. Id. at 15. No questions are raised concerning the continuing desire of any of these class members for the seniority relief presently in issue. No questions are raised concerning the tenacity and competence of their counsel in pursuing that mode of legal relief before this Court. It follows that there is no meaningful sense in which a "live controversy" reflecting the issues before the Court could be found to be absent.

424 U.S. at 755-57, 96 S.Ct. at 1260, 47 L.Ed.2d at 456-57 (footnotes omitted).

We apply the principles of these two cases to Mrs. Satterwhite's class action.[10] Here, the district court denied

10. We think it irrelevant to our Article III analysis whether mootness vis-a-vis the named representative is "fact-created," as in *Sosna*, or created by application of law, as in *Franks* and *Satterwhite*. The Court did not distinguish between these sorts of situations in

certification of the class action. The plaintiff representatives in *Sosna* and *Franks* did not face this additional problem. *See Franks*, 424 U.S. at 755, 96 S.Ct. at 1260, 47 L.Ed.2d at 456 ("Given a properly certified class action, . . ."); *East Texas Motor Freight System, Inc., v. Rodriguez*, ____U.S.____, ____ n.12, 97 S.Ct. 1891, 1898, 52 L.Ed.2d 453 (1977) ("provided the initial certification was proper") (dictum). Thus, it would appear that our first inquiry in facing the case or controversy issue should be whether the district court's refusal to certify was proper, viewed from the time at which that court "[could] reasonably be expected to rule" on the certification question.[11] We have consistently urged the district courts to follow Rule 23(c)(1)'s general instruction to determine this question "[a]s soon as practicable after the commencement of [the] action". *See, e.g., Huff*, 485 F.2d at 712. Accordingly, we would focus upon some time prior to Mrs. Satterwhite's loss on her individual claim.

dealing with the general problem of class actions whose representatives have for one reason or another lost or abandoned their individual claims. *See Rodriguez*, ____ U.S. at ____ n. 12, 97 S.Ct. at 1898, referring to "subsequent events or the proof at trial". *See also Thurston v. Dekle*, 531 F.2d 1264, 1270-71 & n. 10 (C.A. 5, 1976).

However, the reason why a named plaintiff's claim has been eliminated may concurrently, though not necessarily, have an impact on the adequacy of his further representation of the class under Rule 23(a)(4). *See Huff*, 485 F.2d at 714: "It is inescapable that in some cases there will be overlap between the demands of 23(a) and (b) and the question of whether plaintiff can succeed on the merits." *Accord, Long v. Sapp*, 502 F.2d 34, 42 (C.A. 5, 1974).

11. "There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. . . ."
Sosna, 419 U.S. at 402 n. 11, 95 S.Ct. at 559, 42 L.Ed.2d at 542 n. 11.

In fact, the district court did just this. On February 4, 1975, some seven weeks before trial began, the court denied plaintiff's motion for class action, after both parties had submitted memoranda of law on the question.[12] However, lacking further evidence, we cannot answer the question whether on February 4 the district court abused its discretion[13] in denying certification. There is nothing in the record in this case to guide us in our Rule 23 (and, therefore, Article III) inquiry, because the district court's pretrial ruling prevented the scope of the trial from extending beyond Mrs. Satterwhite's individual claim over the airport manager position.[14]

[1] This interlocutory order, which effectively eliminated the class aspects of the litigation, was preceded by no factfinding as to the requisites of Rule 23. As we have noted before:

12. Plaintiff gave notice of appeal from this order but subsequently changed her mind, perhaps in recognition of its interlocutory nature. *See, e. g., Jones v. Diamond,* 519 F.2d 1090, 1095-96 (C.A. 5, 1975).

13. *See Carey v. Greyhound Bus Co.,* 500 F.2d 1372, 1380 (C.A. 5, 1974).

14. In seeking to prove her individual claim of sexual discrimination, Mrs. Satterwhite introduced some evidence of the city's hiring and promotion policies in other departments. But it is clear that her attorney did so only to prove a pattern or practice in aid of her indivdual claim, and not to prove any of the requirements of Rule 23:

> MR. DAVES: ". . . [A]s I know the Court's aware, the Court Court did dismiss the class action aspects of the suit but employment discrimination is by name class discrimination and I'm entitled to put on evidence of other sexual discrimination by the City of Greenville.
> THE COURT: I will overrule the objection.
> Q. Okay, Mrs. Tillitson, have you ever had occasion to apply for any position with the City of Greenville?

> Maintainability may be determined on the basis of pleadings, . . . but "[t]he determination usually should be predicated on more information than the complaint itself affords." 7A Federal Practice & Procedure (Wright & Miller ed). § 1785, p. 131. The court may, and often does, permit discovery relating to the issues involved in maintainability, and a preliminary evidentiary hearing may be appropriate or essential as a part of the vital management role which the trial judge must exercise in class actions to assure that they are both meaningful and manageable. . . . [W]e reject . . . the argument that the judge is inextricably bound by the face of the pleadings.

Huff, 485 F.2d at 713 (footnotes omitted). The peculiar, administrative nature of class suits requires that the trial judge assume unique supervisory responsibilities. Independent of the efforts of the parties, he must satisfy himself of the class nature of the suit, at least when the parties have placed the question in issue.[15]

15. We have held that a motion by one of the parties is unnecessary to bring these duties of the trial judge under Rule 23(c)(1) into play. *See United States v. United States Steel Corp.,* 520 F.2d 1043, 1052 (C.A. 5, 1975), *cert. denied,* 429 U.S. 817, 97 S.Ct. 61, 50 L.Ed.2d 77 (1976); *Rodriguez v. East Texas Motor Freight,* 505 F.2d 40, 50 (C.A. 5, 1974):

> "A class action may not be dismissed because the class representatives fail to ask for a ruling on the propriety of the class nature of the suit. That responsibility falls to the court. 'The court has an independent obligation to decide whether an action brought on a class basis is to be maintained even if neither of the parties moves for a ruling under subsection (c)(1).' Wright & Miller, Federal Practice and Procedure, Civil § 1785 (1972).

In vacating *Rodriguez,* the Supreme Court expressly refused to reject this rule, although the Court's opinion casts some doubt on its continued validity:

> "Even assuming, as a number of courts have held, that a district judge has an obligation on his own motion to determine whether an action shall proceed as a class action, . . . the

[2, 3] This is especially true, as we have suggested many times, given the public nature of Title VII actions. These actions are sometimes said to be "perforce" class actions, since by their very nature they challenge the defendant's actions towards a specific group. *Jenkins v. United Gas Corp.*, 400 F.2d 28, 33 (CA5, 1968); Comment, *supra* note 5, at 601. Of course, the mere fact that Title VII is involved does not relieve the plaintiff of his burden of proof as to the technical requirements of Rule 23(a), most notably the numerosity and adequacy factors. *Rodriguez v. East Texas Motor Freight,* 505 F.2d 40, 50 (CA5, 1974), *vacated on other grounds,* ____U.S.____, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977). No doubt there is tension between the inherently class-based nature of racial and sexual discrimination claims and the procedural need for devices to bring such claims into a focus sharp enough to be manageable by the court as well as fair to the defendant and to those who may subsequently be bound by the litigation. The Supreme Court's recent opinion in *Rodriguez* recognizes this tension in a racial discrimination context:

> We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law or fact are typically present. But careful attention to the requirements of Fed.Rule Civ.Proc. 23 remains nonetheless indispensable. The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination.

____U.S. at____, 97 S.Ct. at 1898. All we are saying is that the court should be hesitant in such cases to conclude that Rule 23 has not been satisfied without resort to a factfinding process.

[4] As an example, in *Jones v. Diamond,* 519 F.2d 1090 (CA5, 1975), the district court had denied the motion for class action on the basis that the pleadings did not reveal enough to satisfy the Rule 23 requirements. The plaintiffs had done little if anything by way of formal introduction of evidence "to flesh out the Rule 23 skeleton." However, as here, they were given no opportunity to do so. *Id.* at 1099 n.14. Citing the trial court's "substantial management responsibility" in Title VII class actions, this court held that the trial court had abused its discretion in failing to hold an evidentiary hearing on its own initiative. Only in allowing a hearing, in the circumstances of that case, could the plaintiffs' "burden of proof" as to Rule 23(a) have had any real meaning. *See also McArthur v. Southern Airways, Inc.*, 556 F.2d 298, 302 (CA5, 1977).

Perhaps we have less flesh on the skeleton here. In *Jones,* this court alluded to a set of interrogatories never introduced as evidence that could have helped in answering the Rule 23 question. Here, pretrial discovery has

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named plaintiffs' failure to protect the interests of class members by moving for certification surely bears strongly on the adequacy of the representation that those class members might expect to receive."

____ U.S. at ____, 97 S.Ct. at 1897 (citations omitted). In *Rodriguez,* however, the Supreme Court found—contrary to the panel of this court—that the plaintiffs never seriously put the class question in issue. That is not true here, where the plaintiff clearly invoked Rule 23 in her complaint and made a formal motion for a class action as early as December 26, 1974, with a supporting brief. Accordingly, all we need say is that the trial court's supervisory responsibilities once certification is at issue include a duty to hold an evidentiary hearing on the matter when a genuine dispute exists about the question.

resulted only in a computer printout listing city employees by position and indicating their sexes. But we think that Mrs. Satterwhite presented a genuine claim to having satisfied Rule 23(a)'s requirements, given the existence of this printout and the genuine dispute found in the pretrial briefs over the Rule 23(a) criteria. In view of the trial court's supervisory responsibilities under Rule 23 as well as the almost presumptively class based nature of Title VII suits, we hold that some evidentiary exploration of the issues was required prior to the Court's February 4, 1975, ruling.

We think our above analysis of the Rule 23(a) certification inquiry that *Sosna* and *Franks* require in asking the larger case or controversy question is not affected by the Supreme Court's recent *Rodriguez* opinion. *Rodriguez,* a unanimous decision, held it error for a panel of this court to have certified a particular class of drivers because, among other reasons,[61] the district court had already found against the named plaintiffs by virtue of their being unqualified. Thus, on the state of the record, the Supreme Court said, the named plaintiffs had suffered no injury as a result of the alleged discriminatory practices, and were therefore "not members of the class of discriminatees they purported to represent." But the dispositive factor in *Rodriguez* was that the issue of certification had been left until the end of the named plaintiffs' two-day trial. As in *Sosna* and *Franks,* the existence or nonexistence of prior certification became the touchstone:

16. The Court also pointed to the plaintiffs' failure to ask for certification and their disagreement with the union majority concerning the desirability of relief as strong indications of inadequacy under Rule 23(a)(4). ____ U.S. at ____, 97 S.Ct. 1891. But the opinion's insistence on membership in the class makes these last two flaws in the plaintiffs' case unnecessary to the result.

Obviously, a different case would be presented if the District Court had certified a class and only later had it appeared that the named plaintiffs were not class members or were otherwise inappropriate class representatives. In such a case, the class claims would have already been tried, and, provided the initial certification was proper and decertification not appropriate, the claims of the class members would not need to be mooted or destroyed because subsequent events or the proof at trial had undermined the named plaintiffs' individual claims. *See, e.g., Franks v. Bowman, supra,* [424 U.S. 747], at 752-757, [96 S.Ct. 1251, 1258-1261]; *Moss v. Lane Co.,* 471 F.2d 853, 855-856 (CA4). Where no class has been certified, however, and the class claims remain to be tried, the decision whether the named plaintiffs should represent a class is appropriately made on the full record, including the facts developed at the trial of the plaintiffs' individual claims. At that point, as the Court of Appeals recognized in this case, "there [are] involved none of the imponderables that make the [class action] decisions so difficult early in litigation." 505 F.2d at 51. *See also Cox v. Babcock & Wilcox Co.,* 471 F.2d 13, 15-16 (CA4).

____U.S. at ____ n.12, 97 S.Ct. at 1898. Putting *Sosna* and *Franks* together with this dictum, we think we have such a "different case" here. From the beginning, Mrs. Satterwhite has consistently sought to represent a class of female employees and applicants allegedly discriminated against by the city of Greenville. *See* note 15 *supra.* The question we are asking at this point is whether, on February 4, the district judge was correct in not certifying the action. For if certification would have been proper, the *Rodriguez* inquiry into class membership would be inapplicable for us here. All Mrs. Satterwhite would have to do, for Rule 23(a3 purposes, would be to demonstrate

now that "decertification [would] not [now be] appropriate." ____U.S. at ____ n.12, 97 S.Ct. at 1898; *Sosna*, 419 U.S. at 403, 95 S.Ct. at 559, 42 L.Ed.2d at 542-43.

This emphasis upon certification which we discern from the *Rodriguez* dictum has support in the *Sosna-Franks* line of cases, as we have observed And absent such a distinction, cases like *Huff v. N. D. Cass Co.*, 485 F.2d 710 (CA5, 1973) (en banc), would have to give way to the following language in *Rodriguez*:

> In short, the trial proceedings made clear that Rodriguez, Perez, and Herrera were not members of the class of discriminatees they purported to represent. As this Court has repeatedly held, a class representative must be part of the class and "possess the same interest and suffer the same injury" as the class members. . . . The District Court found upon abundant evidence that these plaintiffs lacked the qualifications to be hired as line drivers. Thus, they could have suffered no injury as a result of the alleged discriminatory practices, and they were, therefore, simply not eligible to represent a class of persons who did allegedly suffer injury. Furthermore, each named plaintiff stipulated that he had not been discriminated against with respect to his initial hire. In the light of that stipulation they were hardly in a position to mount a classwide attack on the no-transfer rule and seniority system on the ground that these practices perpetuated past discrimination and locked minorities into the less desirable jobs to which they had been discriminatorily assigned.

____U.S. at ____ - ____, 97 S.Ct. at 1896-1897 (citations omitted). We think, however, that the Court did not intend to overrule *Huff* and like cases. Any such intention would be inconsistent with the Court's approving citation

of *Moss v. Lane Co.*, 471 F.2d 853 (CA4, 1973), the Fourth Circuit's analogue to *Huff*.[17] Thus, we conclude that *Rodriguez'* reliance upon the named plaintiffs' loss on the merits does not apply to a situation where an appropriate certification decision would have[18] preceded the individual plaintiff's loss on the merits.

The court's post hoc answer to this maintainability issue on remand will determine whether, at the time Mrs. Satterwhite lost on her individual claim, there existed a legal entity apart from her which possibly could have maintained a personal stake in the controversy. Even assuming maintainability, however, *Sosna* and *Franks* require further that, in the circumstances of this case,

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17. *Moss*, like *Huff*, held that it was improper for the district court, after it had denied a motion to dismiss the class action on the basis that the plaintiff had met the four criteria of Rule 23(a), to have reversed itself later "simply because it concluded that the mere fact that on the trial of the merits the plaintiff had not sustained his claim denied him the right to represent the class". 471 F.2d at 855-56.

18. One might still ask whether or not our retrospective determination of a potential certification in this case dating back to several weeks before trial is consistent with *Rodriguez*. The Court there at least impliedly sanctioned a decision denying certification made no earlier than the conclusion of the two-day trial on the named plaintiff's claims. But the circumstances before us are different. Here, there was a December 26, 1974, motion by Mrs. Satterwhite for certification, and a February 4, 1975, pretrial denial by the trial court. Justice Rehnquist's instructions in *Sosna* are to view the question no later than when the trial court could reasonably have been expected to rule on it. These instructions, which we believe to have been inspired by the mandate of Rule 23(c)(1), dictate to us the conclusion that the district court should indeed have issued a response as early as February 4. The district court obviously agreed. Whether *Rodriguez'* implied refusal to require a similar pretrial ruling arose from the plaintiffs' failure to ask for one, *see* note 15 *supra*, or from a view that the circumstances there did not make it "practicable" to do so, Rule 23(c)(1), is a question we need not answer. Neither of these problems exists here.

the class does in fact have such a stake as to maintain a live controversy.

On the present state of the record, we are tempted to say that the class members do not. Much of our preceding discussion regarding the Rule 23(a) question is applicable here. We confront a threshold problem of having no "identifiable individuals, individually named in the record",[19] at which to look. Plaintiff's Exhibit 1 reveals the names of the present female employees.[20] All this computer printout shows to us is simply that there are some employees who, by virtue of their given names, appear to be females and who have certain kinds of jobs and wage rates. There is no showing that any of these persons nurse a grievance against the city. They certainly have not "already availed themselves of . . . hiring relief", as had the class members in *Franks*. In sum, we cannot point to anyone (other than perhaps Mrs. Tillitson, *see* note 14 *supra*) in the class with a personal stake in the outcome of this Title VII challenge. Nor has Mrs. Satterwhite done so in her response to the petition for rehearing.

Must we therefore dismiss this case for lack of a case or controversy? Or should Mrs. Satterwhite be permitted to develop the existence of interested class members on remand to the district court? Mrs. Satterwhite urges us to decide this question on the present state of the record, a not very favorable position for her in view of our preceding development of the law of Article III. But we think that dismissal would be unfairly formalistic here. Since the district court dismissed the class aspects of the

19. *Franks*, 424 U.S. at 756, 96 S.Ct. at 1260, 47 L.Ed.2d at 457.

20. This list of course identifies no job applicants.

suit at the outset, plaintiff had no real opportunity to develop jurisdictional facts necessary to sustain the class nature of the action.[21]

[5] As Justice Rehnquist noted in *Sosna,* there also remains a final question of whether, even though the class members might proceed without offending the requirements of Article III, those class members can still be adequately represented by this particular individual. *See also Rodriguez,* ____U.S. at____ n.12, 97 S.Ct. 1891. We adhere to the view expressed in our prior opinion that under *Huff* Mrs. Satterwhite's mere failure to succeed on her individual claim cannot in and of itself negate the adequacy requirement. *See also Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177-78, 94 S.Ct. 2140, 2152, 40 L.Ed.2d 732, 748-49 (1974).[22] This does not end the inquiry, however. Our prior opinion prematurely decided the difficult question of adequate representation without benefit of any factual development of the class nature of the suit. We leave to the district court, informed by the facts developed on remand, this question whether Mrs. Satterwhite should be permitted to pursue the claims of the putative class.[23]

21. She probably had an incentive to do so, in view of her intention, previously revealed, ultimately to appeal the refusal to certify. See note 12 *supra*. We do not fault her, however, for acquiescing in the district court's view of the case at trial.

22. As noted above, we think *Rodriguez* does not overrule *Huff*.

23. Remand is consistent with our past practice in cases where district courts have given improper consideration to the merits of the named plaintiff's claim. *See, e. g., Huff, supra; Long v. Sapp,* 502 F.2d 34, 43 (C.A. 5, 1974); *Johnson v. Georgia Highway Expres, Inc.,* 417 F.2d 1122, 1124-25 (C.A. 5, 1969). *Cf. Rodriguez,* ____ U.S. at ____, 97 S.Ct. at 1896 (". . . [W]e do not reach the question whether a Court of Appeals should ever certify a class in the first instance.")

[6] In conclusion, faced with an Article III challenge by the city to jurisdiction in this case, we withdraw that portion of our prior opinion concerning the class question and remand this issue for factual determinations by the district court, after evidentiary hearing. These determinations should include, but are not necessarily limited to, answers to the following questions:

(1) As of February 4, 1975, did Mrs. Satterwhite satisfy the four requirements of Rule 23(a)?

Regarding the standard for the district court's inquiry on remand, we have perhaps been less than clear in the past. In *Huff* we required the sort of "nexus" that "is embraced in the various requirements of 23(a) and (b)." 485 F.2d at 714. In a sense, this is redundant, since no class action can proceed without satisfying these requirements. In *Long* this court held (1) that plaintiff had "demonstrated the necessary nexus with the proposed class for membership therein" and yet (2) that the case should be remanded for a Rule 23(a)(4) adequacy determination, under the standard of *Johnson* (competent attorney plus lack of antagonistic interest). *Long* thus suggests that there are two requirements before the court can allow the named plaintiff to represent the class. The nexus requirement answers the question, in this particular context, whether the plaintiff is still a member of the class. Nexus would thus turn on such considerations as the plaintiff's personal associations with the situation, and its influence upon him, and his ties with the class. Comment, *supra* note 5, at 608. Adequacy is determined by the *Johnson* factors.

As noted above, Justice Rehnquist made reference only to the *Johnson* factors in *Sosna*:

> "In the present suit, where it is unlikely that segments of the class appellant represents would have interests conflicting with those she has sought to advance, and where the interests of that class have been competently urged at each level of the proceeding, we belive that the test of Rule 23(a) is met."

419 U.S. at 403, 95 S.Ct. at 559, 42 L.Ed.2d at 543. We do not interpret *Sosna* to have eliminated our nexus requirement. Membership in the class has always been required. 7 C. Wright & A. Miller, Federal Practice & Procedure § 1761 (1972). Indeed, the Court referred to the existence of a two-fold inquiry in *Rodriguez* in discussing our "different case": "Obviously, a different case would be presented if the District Court had certified a class and only later had it appeared that the named plaintiffs *were not class members or were otherwise inappropriate class representatives.*" ____ U.S. at ____, n. 12, 97 S.Ct. at 1898 (emphasis supplied).

(2) If so, upon her dismissal from the case, did the class members retain sufficient interest in the outcome of this litigation to serve as Article III plaintiffs?

(3) If they did, can Mrs. Satterwhite justify her representation of their interests?

The petition for rehearing is GRANTED and the prior opinion, 549 F.2d 347 (CA5, 1977), is withdrawn. The case is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings not inconsistent with this opinion.

GEE, Circuit Judge (dissenting):

Prompted to further thought about Mrs. Satterwhite's potential status as class representative by the petition for rehearing, by the Supreme Court's intervening decision in *East Texas Motor Freight System, Inc. v. Rodriguez*, ____U.S.____, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977), and in no small measure by the majority's fine and thorough opinion on rehearing, I find myself no longer able to put aside some doubts which had arisen in my mind before my concurrence in the original panel opinion. I recognize—as I must, being bound by *Huff v. N. D. Cass Co.*, 485 F.2d 710 (5th Cir. 1973) (en banc)—that the patent conflict of interest which logically seemed to foredoom Mrs. Satterwhite's individual claim of sex discrimination did not legally, at the pretrial stage when the district court denied certification, preclude her serving as class representative. But federal courts must always remain aware that Article III of the Constitution precludes our taking and retaining purported jurisdiction over anything less than a case of controversy brought by a person having standing to pursue it, and at this stage

we have before us more information—in the form of the district court's adverse determination, affirmed by this court, of her claim of individual discrimination—than did the district court at the pretrial stage in declining to certify the class with her as representative. Having come to believe that the remand ordered by the majority, a remand on which Mrs. Satterwhite is to be permitted to reargue the existence of a class and the propriety of her representation of it after she has been shown to have no personal interest in the relief sought by the class, countenances a contravention of Article III, I must respectfully dissent.

Huff and its progeny within this circuit hold that the existence of a defense which appears likely to defeat a named plaintiff's individual claim is not alone sufficient to support a ruling that he is not a proper class representative. But as the majority notes, *ante* at 1, the en banc court which decided *Huff* was not confronted with and did not consider the Article III implications of the remedy, which the majority grants today, of requiring further consideration of the named plaintiff as a class representative after a conclusive adjudication that he has not suffered the injury alleged to be common to the class and thus may not receive the relief sought on behalf of the class. There doubtless is utility in precluding an advance determination that the likelihood of failure of an individual's own claims disqualifies him as the individual plaintiff for a class. But this utility vanishes when the plaintiff's nonmembership in the class has become the law of the case through the trial court's adjudication, affirmed on appeal, that the would-be class plaintiff has not suffered the injury asserted for the class. At this point, we are no longer dealing with a plaintiff

who may lose, or who probably will lose, but with one who *has lost*: who by virtue of our own words is divorced from the case and no longer holds a personal interest in the outcome of the trial of the class action. At this point I see no particular reason to cling so tenaciously to Mrs. Satterwhite as a potential class representative.

And especially is this so in view of the constitutional standing question. Since she no longer has any personal interest and thus no standing in her own behalf, it seems to me that the case must be dismissed unless we have before us some other party who does possess the requisite personal stake in a continuing live controversy. But the only other potential party mentioned in the record is the asserted class, and I therefore consider its status as a plaintiff after Mrs. Satterwhite is gone. With the majority, I find in *Sosna v. Iowa,* 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), and in *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), a heavy emphasis on certification of the class as the initial event in determining standing questions in class suits, but in my view that emphasis weights against the majority's demand. In *Sosna* and *Franks,* the Court recognized that the class when certified is for some purposes treated as a separate plaintiff with grievances all its own, apart from the claims of its individual representatives. After certification, then, if the claims of all individual plaintiffs prove meritless or become moot, the class may itself possess such a "personal stake in the outcome of the controversy", *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962), as to warrant continued invocation of federal jurisdiction in its own behalf. But—and this is the crux of my disagreement—here the situation is altogether dif-

ferent; since certification represents the birthdate of the class as a jurisprudential entity, the district court's denial of certification, whether correct or not, means that no class is present to carry the case after we determine that Mrs. Satterwhite's individual claims are meritless.

Thus, we now have before us no one who has a continuing stake in the controversy, only a potential lawsuit searching for a sponsor. I do not believe that Article III permits a remand on which the district court is to retain jurisdiction, even for the limited period of time during which Mrs. Satterwhite is to bring forward motions and argument in support of her representation of the asserted class, over a headless lawsuit with, in effect, no plaintiff. Such procedures smack too much of principle and policy, too little of concrete controversy, too much of legislation, and too little of adjudication for me to feel comfortable with them. I think the proper disposition would be simply to affirm as to Mrs. Satterwhite's personal claims while expressing our disagreement with the district court's undue emphasis on probability of individual success, thus providing some guidance for a proper exploration of the representation question when and if someone else re-institutes the litigation.[1] We now fortuitously *know* that Mrs. Satterwhite is neither personally aggrieved nor a member of an injured class, and allowing her an attempt to rally a class around her unfortunately fails to assure "that concrete adverseness which sharpens the presentation of issues", *id.*, which a more careful attention to standing would assure.

The Supreme Court seems to me to have set its face against the retention of purported jurisdiction on remand

1. For all we know, by now there may be no one sufficiently aggrieved to wish to do so—or, indeed, aggrieved at all.

here by a post-*Sosna* decision in a related context. In *Board of School Commissioners v. Jacobs,* 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975), the Court found that the individual claims of six plaintiffs challenging school regulations were mooted before oral argument upon the graduation of all of the named plaintiffs. Although the suit contained class allegations and the record indicated that the district court may have been favorably disposed toward granting representative status to the named plaintiffs, the class action was never properly certified because of the district court's failure to enter an order showing compliance with Rule 23. "Because the class action was never properly certified nor the class properly identified by the District Court . . . ," 420 U.S. at 130, 95 S.Ct. at 850, the entire case was rendered moot by the events which mooted the individual claims.[2] No less in *Jacobs* than in the case *sub judice* could a remand have afforded class members a chance to correct district court action which may have cost them the

2. In *Napier v. Gertrude,* 542 F.2d 825 (10th Cir. 1976), cert. denied, 429 U.S. 1049, 97 S.Ct. 759, 50 L.Ed.2d 765 (1977), a case rather similar to the one before us, the district court refused to consider certification of a class action because of its denial on the merits of individual relief. After the judgment, the passage of time rendered the invidiual complaint moot and precluded appellate consideration of it; grappling with whether or not to order a remand so that the trial court might reconsider class certification absent its previous undue emphasis on success of individual claims, the Tenth Circuit found such a remand improper and ordered dismissal. The *Napier* court noted that we had ordered a remand under somewhat similar circumstances in *McGill v. Parsons,* 532 F.2d 484 (5th Cir. 1976), but distinguished *McGill*—correctly, I think—on the basis of the certification of McGill as class representative before the dismissal of both individual and class claims. Decisions of other courts of appeal further emphasize the importance of the certification event in this context. *See, e. g., Cleveland v. Ciccone,* 517 F.2d 1082, 1084-85 n. 13 (8th Cir. 1975); *Bradley v. Housing Authority,* 512 F.2d 626, 628 (8th Cir. 1975).

right to proceed as a class when the initial certification decision (or lack of same) was presented. Nevertheless, traditional notions of limited federal court jurisdiction prevailed, as I suggest they should here, where we contemplate a plaintiff who has not *lost* a claim due to mootness but rather *never* had one.

I can perceive no practical difference between the disposition which I suggest and the remand ordered by the majority, save perhaps the desirable end of removing from the pleadings the name of one who has no stake in the outcome of the suit she retains possession and control over under the remand. The threshold question to be decided when the class claims again come before the district court will be whether a class exists at all. But the same legwork which will produce evidence of the existence of a class of women discriminatees will also produce the names of members of that class, at least some of whom will be proper representatives—if such potential representatives are not already waiting in the wings. If there is indeed a live controversy with aggrieved individuals sufficiently numerous to make up a class, surely one of those proper representatives will be willing to come forward to serve as a plaintiff, and if no one is so willing, I see no reason to be contemplating class relief. Although my suggested disposition would preclude reconsideration under the correct standards of the question of *Mrs. Satterwhite's* eligibility to represent the class, proper language in our opinion would furnish sufficient guidance for the district court to consider correctly the class-representation question, free of undue emphasis on probability of individual success, when *someone else* steps forward. As I have attempted to show, until that someone else does come forth, any concern

about the apparent misapprehension of our law by the district court in its treatment of the class questions is, I believe, misplaced.

In sum, Mrs. Satterwhite should no longer be a part of this case under the constitutional standards which we must apply, and the majority's opinion allowing her to continue with class proceedings seems to me a concession to the notion that a class suit belongs to no one so much as to the plaintiff's lawyer. Desiring to make no such concession, I dissent.

APPENDIX D

MINDA SATTERWHITE, on behalf of herself and others similarly situated, *Plaintiffs-Appellants,*

v.

CITY OF GREENVILLE, TEXAS, *Defendant-Appellee.*

NO. 75-3377.

UNITED STATES COURT OF APPEALS, Fifth Circuit.

August 23, 1978.

Female applicant who was not hired as manager of municipal airport filed sex discrimination suit individually and on behalf of class of present and prospective female employees of city. The United States District Court for the Northern District of Texas, William M. Taylor, Jr., Chief Judge, 395 F.Supp. 698, entered judgment for city, and plaintiff appealed. The Court of Appeals, 549 F.2d 347, held that although plaintiff's individual sex discrimination claim failed, she could proceed with her class action. On petition of city for rehearing, the Court of Appeals, 557 F.2d 414, vacated its prior decision with respect to class action issues and remanded case for evidentiary hearing. Sitting en banc, the Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) where named plaintiff had never suffered any legal recognizable injury either in common with class or otherwise and where named plaintiff was not member of class even at time suit was filed, named plaintiff was

not proper class representative, and (2) district court's failure to hold evidentiary hearing on motion for class certification did not preclude dismissal.

Appeal dismissed, panel opinion vacated, and case remanded with instructions.

Godbold, Circuit Judge, filed a dissenting opinion in which Brown, Chief Judge, and Goldberg and Simpson, Circuit Judges, joined.

Larry R. Daves, Tyler, Tex., for plaintiffs-appellants.

Paul Mirengoff, Atty., E.E.O.C., Washington, D.C., amicus curiae.

John A Martin, Rod Phelan, Dallas, Tex., for defendant-appellee.

Douglas S. McDowell (Equal Employment Advisory Council), Washington, D.C., amicus curiae.

Appeal from the United States District Court for the Northern District of Texas.

Before BROWN, Chief Judge, and COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, SIMPSON, MORGAN, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY and RUBIN, Circuit Judges,*

ALVIN B. RUBIN, Circuit Judge:

[1, 2] The appeal in this case, originally filed as a class action, raises the question whether Article III[1] of the

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* Judges Thornberry and Vance did not participate in the consideration of or decision in this case.

1. We are mindful that, with respect to Civil Rights Acts, including Title VII, 42 U.S.C. § 2000e, *et seq.*, there is a " 'congres-

Constitution and Rule 23,[2] Federal Rules of Civil Procedure, permit a named plaintiff whose individual claim has been properly dismissed on the merits to represent a putative class where the district court, prior to the loss of the individual claim, denied certification of the class without conducting an adequate hearing.

Minda Satterwhite, the named plaintiff, applied for the position of manager of Greenville's municipal airport. She was denied that office on the asserted basis that she would have a conflict of interest because her husband's business was the primary user of the airport. After a male was hired, she filed a class action on behalf of all present and prospective female employees of the city allegedly victimized by (1) a discriminatory hiring policy, (2) sexually segregated job classifications, and (3) a discriminatory compensation scheme, in violation of Title VII, 42 U.S.C. § 2000e, *et seq.*

Mrs. Satterwhite moved for certification of the class without introducing any evidentiary material with respect to its maintainability other than a computer printout of city employees indicating their position and gender. On February 4, 1975, without conducting an evidentiary hearing, the district court denied certification. After the later trial on the merits of Mrs. Satterwhite's individual

sional intention to define standing as broadly as is permitted by Article III of the Constitution,'" *Trafficante v. Metropolitan Life Ins. Co.*, 1972, 409 U.S. 205, 209, 93 S.Ct. 364, 367, 34 L.Ed.2d 415, quoting *Hackett v. McGuire Bros., Inc.*, 3 Cir. 1971, 445 F.2d 442, 446.

2. The adequacy-of-representation requirement derives from the due process protections due process protections due those who are not before the court but will be directly bound by its decree. *Hansberry v. Lee*, 1940, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22; *Gonzales v. Cassidy*, 5 Cir. 1973, 474 F.2d 67, 72; *Clark v. So. Central Bell Tel. Co.*, W.D. La. 1976, 419 F.Supp. 697, 701.

claim, the court entered judgment for the city, *Satterwhite v. City of Greenvill, Tex.*, N.D. Tex. 1975, 395 F.Supp. 698, on the basis that a male applicant with a similar conflict of interest would likewise have been denied the position. A panel of this court affirmed on the merits with respect to her individual claim, but reversed the denial of class certification. *Satterwhite v. City of Greenville, Tex.*, 5 Cir. 1977, 549 F.2d 347.

Upon rehearing, a divided panel vacated its prior decision with respect to the class action issues, *Satterwhite v. City of Greenville, Tex.*, 5 Cir. 1977, 557 F.2d 414. It found that the district court had failed to conduct an adequate evidentiary hearing with respect to maintainability, and that Article III and Rule 23 would permit Mrs. Satterwhite to represent the class notwithstanding the loss of her individual claim if: the denial of certification was improper under the circumstances existing at the time of the ruling;[3] the putative class members presently have sufficient interest in the outcome of the litigation to serve as Article III plaintiffs; and Mrs. Satterwhite can still adequately represent that class, notwithstanding her loss on her individual claim. Finding the record insufficient to permit it to decide whether these criteria were satisfied, the panel remanded for an evidentiary hearing. For reasons detailed in this opinion, the panel opinion is vacated, and we conclude that, on the record as a whole, Mrs. Satterwhite is not a proper class representative because she neither has claims typical of the members of the class nor has an adequate common interest or

3. The panel was concerned with the facts existing at the time when the court could reasonably have been expected to rule, which, in this case, was February 4, 1975, the date of the actual ruling. 557 F.2d at 422 n. 18.

nexus with them. Therefore, the judgment of the trial court dismissing the class claims is affirmed. Because, under these circumstances, the class action cannot meet the requirements of Rule 23, Federal Rules of Civil Procedure, we need not reach the issue whether the plaintiff has the requisite standing to sue under Article III, Section 2 of the Constitution.

I.

As the panel correctly perceived, our course must be charted by the recent Supreme Court decisions in *Sosna v. Iowa,* 1975, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532, and *Franks v Bowman Transportation Co, Inc.,* 1976, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444. Unlike the panel, however, we conclude that our destination is determined by *East Texas Motor Freight System Inc. v. Rodriguez,* 1977, 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453.

In both *Sosna* and *Franks* the court considered separately each of the issues involved here, constitutional standing to sue, and adequacy of the class representative. In each case, a class had been properly certified by the district court, but the claims of the individuals who sought to represent the class had become moot during the appellees process. The court reasoned that certification bestows upon the class a "legal status separate from the interest asserted by [the named representative]." *Sosna, supra,* 419 U.S. at 300, 95 S.Ct. at 557. Hence, if unnamed class members maintain a personal stake in the outcome, a live controversy satisfying the requirements of Article III exists. *Franks, supra,* 424 U.S. at 756-57, 96 S.Ct. at 1260; *Sosna, supra,* 419 U.S. at 402, 95

S.Ct. at 559. The court then determined that the named representatives would "fairly and adequately protect the interests of the class," as required by Rule 23(a), F.R. C.P., notwithstanding the mootness of their individual claims.[4]

In *Rodriguez, supra,* the putative class had never been certified, and it had been determined upon trial that the named representative-plaintiffs' individual claims were without merit. This court certified the class while the case was on appeal. The Supreme Court reversed, "for the simple reason that it was evident by the time the case reached [the Court of Appeals] that the named plaintiffs were not proper class representatives under Fed. Rule Civ. Proc. 23(a)," because they "were not members of the class of discriminatees they purported to represent . . . [A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." 395 U.S. at 403, 97 S.Ct. at 1896. Thus, in *Rodriguez* the court based its decision on the failure of the clas representatives to meet the requirements of Rule 23 and did not consider the question of standing.

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4. *Sosna, supra,* 419 U.S. at 403, 95 S.Ct. at 559. In *Sosna,* the claim was one "capable of repetition, yet evading review." 419 U.S. at 400-01, 95 S.Ct. at 558. Hence, if a representative with a moot claim could not be deemed adequate for Rule 23 purposes, the controversy might never be adjudicated. *See also Gerstein v. Pugh,* 1975, 420 U.S. 103, 110 n. 11, 95 S.Ct. 854, 861, 43 L.Ed.2d 54; *Frost v. Weinberger,* 2 Cir. 1975, 515 F.2d 57, 64. However, the court in *Franks* held, "nothing in our *Sosna* or *Board of School Comm'rs* [*v. Jacobs,* 1975, 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74] opinions holds or even intimates that the fact the named plaintiff no longer has a personal stake in the outcome of a certified class action renders the class action moot unless there remains an issue 'capable of repetition, yet evading review.'" 424 U.S. at 754, 96 S.Ct. at 1259.

[3, 4] Similarly, it is now apparent that Mrs. Satterwhite is not a member of the class of discriminatees she seeks to represent. Unlike the individual representatives in *Sosna* and *Franks,* who suffered the same injury as other class members, but whose claims were mooted before the appellate process was exhausted, Mrs. Satterwhite has never suffered any legally cognizable injury either in common with the class or otherwise.[5] That Mrs. Satterwhite's individual claim lacks merit does not, of course, determine that she cannot adequately represent the class, but her lack of nexus with, and membership in, the class is fatal. She is not an employee of the city, and she has neither alleged in her complaint nor proved at the trial any facts indicating that she has herself been injured or will be injured by any of the policies that she complains of other than those relating to her airport manager claim now shown to be untenable. This court has affirmed that Mrs. Satterwhite was not the victim of discrimination on the part of the defendant. Hence, she is not at present a member of the class, and we now know that she was not a member even at the time that suit was filed, *see Payne v. Travenol Laboratories, Inc.,* 5 Cir. 1978, 565 F.2d 895, 898, *amended,* March 23, 1978; *Thurston v. Dekle,* 5 Cir. 1976, 531 F.2d 1264, 1269-1270. It is this lack of nexus, rather than a lack of merit to her claim of discrimination, that proves she is not a proper class representative. *See Long v. Sapp,* 5 Cir. 1974, 502 F.2d 34, 42.

5. We agree with the panel that it is irrelevant whether mootness is "fact-created," as in *Sosna,* or created by application of law, as in *Franks* or *Satterwhite.* 557 F.2d at 418 n. 10. But, as the panel noted, "the reason why a named plaintiff's claim has been eliminated may concurrently, though not necessarily, have an impact on the adequacy of his further representation of the class under Rule 23(a)(4)." *Id.*

There may be instances where a plaintiff whose individual claim has been lost retains a personal stake in the outcome of the suit, or a "sufficient homogeneity of interests" with the class to represent it, *Sosna, supra,* 419 U.S. at 403 n. 13, 95 S.Ct. at 559. For example, a female employee qualified for promotion, but passed over in favor of a more qualified male, may complain of a policy of not promoting females that threatens to injure her in the foreseeable future. *Compare Horn v. Associated Wholesale Grocers, Inc.,* 10 Cir. 1977, 555 F.2d 270, 276-277, and cases cited therein; *Donaldson v. Pillsbury Co.,* 8 Cir. 1977, 554 F.2d 825, 831 n. 5, *cert. denied,* 1977, 434 U.S. 856, 98 S.Ct. 177, 54 L.Ed.2d 128, and cases cited therein; *Moss v. Lane Co., Inc.,* 4 Cir. 1973, 471 F.2d 853, 855 (cited with approval in *Rodriguez, supra,* 97 S.Ct. at 1898 n. 12); with *Rodriguez, supra,* and *Walker v. World Tire Corp., Inc.,* 8 Cir. 1977, 563 F.2d 918, 922.[6] But Mrs. Satterwhite now lacks any such tie to the class.

II.

Mrs. Satterwhite contends that, even though it is now known that she has never been a class member, the trial court could not know this at the time of the initial certification decision. Thus, Mrs. Satterwhite argues that, be-

6. In *McBride v. Delta Air Lines, Inc.,* 6 Cir. 1977, 551 F.2d 113, the Court of Appeals, without discussion of the mootness problem, remanded for the lower court to correct its error in denying certification but affirmed the lower court's dismissal of the representative's individual claims. The Supreme Court, without considering the merits of the court's actions, vacated and remanded to the Court of Appeals for further consideration in light of *Rodriguez;* 434 U.S. 916, 98 S.Ct. 387, 54 L.Ed.2d 273. For reasons indicated in this opinion, the Court of Appeals' decision in *McBride* is not necessarily inconsistent with the Supreme Court's decision in *Rodriguez.*

cause the failure to accord an evidentiary hearing was error and because, on remand, she could establish that such a hearing would have resulted in certification of the class with her as representative, the class must now be certified so that she can proceed to represent it as she would have been able to had events proceeded on the road they did not take. That alleged error must be corrected. If she is shown as a result of later events (now already known) to be an inappropriate representative, the defendant might move to decertify on that basis. *See Guerine v. J & W Investment, Inc.*, 5 Cir. 1977, 544 F.2d 863, 864; *Gonzales v. Cassidy*, 5 Cir. 1973, 474 F.2d 67, 73.

[5] We assume, *arguendo*, that, had an evidentiary hearing been held on February 4, 1975, as it should have been, Mrs. Satterwhite would have been declared an appropriate representative and the class would have been certified. *See, e.g., Payne v. Travenol Laboratories, Inc., supra*, 565 F.2d at 900; *Johnson v Georgia Highway Express, Inc.*, 5 Cir. 1969, 417 F.2d 1122, 1124. However, this did not occur and the class was never created. At this stage, it would be an imposition on the litigants and the trial court to require them to engage in academic error-correcting. The Supreme Court, in *Rodriguez*, specifically stated, "Where no class has been certified . . . and the class claims remain to be tried, the decision whether the named plaintiffs should represent a class is appropriately made on the full record, *including the facts developed at the trial of the plaintiffs' individual claims.*" *Rodriguez, supra*, 431 U.S. at 406 n. 12, 97 S.Ct. at 1898 (emphasis added). Hence, in determining whether Mrs. Satterwhite might now represent the class, we must consider the court's determination that Satterwhite was not the victim

of discrimination. Even if she would have appeared to be an appropriate representative on February 4, 1975, she is not now an appropriate representative. *See* note 11 *infra*. This defect is fatal regardless whether the issue is raised by motion to certify, *Sosna, supra; McLaughlin v. Hoffman*, 5 Cir. 1977, 547 F.2d 918, 921 n. 4, or motion to decertify, *Guerine, supra.*

[6] *Rodriguez* cannot be distinguished on the basis that, unlike the plaintiffs in *Rodriguez*, Mrs. Satterwhite moved for certification. Whatever plausibility this suggestion might have if the plaintiff had been the victim of judicial error beyond her control, the plaintiff herself failed even to seek an evidentiary hearing, or to make any offer of proof as to the appropriateness of class action.[7]

[7-9] The panel thought "that *Rodriguez*' reliance upon the named plaintiffs' loss on the merits does not apply to a situation where an appropriate [favorable] certification decision would have preceded the individual plaintiff's loss on the merits." 557 F.2d at 422 (footnote omitted).[8] We need not speculate whether, in *Rodriguez,*

7. The court is required to conduct such a hearing without motion from counsel, *Gore v. Turner*, 5 Cir. 1977, 563 F.2d 159, 165; *U. S. v. U. S. Steel Corp.*, 5 Cir. 1975, 520 F.2d 1043, 1052, *cert. denied*, 429 U.S. 817, 97 S.Ct. 61, 50 L.Ed.2d 77; 7A Wright & Miller, Federal Practice & Procedure: Civil § 1785 (1972). But we must assume that the court would have fulfilled its responsibility had it received a request for a hearing from plaintiff.

8. We agree with the panel that *Rodriguez* is not contrary to the teaching of *Long v. Sapp*, 5 Cir. 1974, 502 F.2d 34, and *Huff v. N. D. Cass Co. of Alabama*, 5 Cir. 1973, 485 F.2d 710, 712-714 (*en banc*). The lack of merit of the representative's claim is not determinative in and of itself of the adequacy of his representation for Rule 23 purposes. *Rodriguez* involved named plaintiffs who lacked a nexus with the class as a result of the lack of merit of their individual claims. As we noted earlier in the opinion, a plaintiff with-

a hearing would or would not have resulted in certification; *Rodriguez* was not remanded for that determination. There, as here, the court knew through data garnered at the trial of the individual claims that the plaintiffs had never been appropriate representatives.[9]

The court in *Rodriguez, supra,* 431 U.S. at 406 n. 12, 97 S.Ct. at 1898 n. 12, recognized,

> Obviously, a different case would be presented if the District Court had certified a class and only later had it appeared that the named plaintiffs were not class members or were otherwise inappropriate class representatives. *In such a case, the class claims would have already been tried,* and, provided the initial certification was proper and decertification not appropriate, the claims of the class members would not need to be mooted or destroyed because

out a viable claim may, in appropriate circumstances, act as class representative, provided he or she is a member of the class and maintains a sufficient homogeneity of interests at every moment of the litigation.

Nor is *Rodriguez* or this opinion contrary to the policy favoring "across the board" Title VII class actions. *See Johnson v. Ga. Highway Express, supra.* It is not necessary that the representative suffer discrimination in the same way as other class members, but it is necessary that she suffer from the discrimination in some respect. *See Long v. Sapp, supra.*

9. The *Rodriguez* plaintiffs had stipulated prior to trial that they had not been discriminated against when first hired and contended only that the failure to consider their line-driver applications constituted discrimination. But it was not determined until trial that they were not discriminated against with respect to their line-driver applications, and their stipulation was sufficient to preclude their membership in, or representation of, a class consisting of "all Negroes and Mexican Americans who had been denied equal employment opportunities with the company because of their race or national origin." The Supreme Court stated, "In short, *the trial court proceedings* made clear that [the representatives] were not members of the class of discriminatees they purported to represent." 395 U.S. at 405, 97 S.Ct. at 1896 (emphasis added).

> subsequent events or the proof at trial had undermined the named plaintiffs' individual claims. *See, e.g., Franks v. Bowman.* . . .
> (Emphasis added.)

[10] Unlike the panel, we do not find present here this different case, postulated in *Rodriguez* and presented in *Franks* and *Sosna.* The putative class here was never certified and the class claims were never tried. Where a class is certified, and class claims tried, before the lack of merit or mootness of the representative's claim is discovered, the class representative has already assiduously asserted the claims of the constituents. The conservation of both litigants' and judicial resources makes it desirable not only to avoid abortion of the litigation but also to prevent prejudice to the members of a certified class who, in the midst of a law suit, suddenly discover that their representative's claim is no longer viable. Here, no evidence concerning the claims of the putative class members has ever been introduced; members of the class have never relied upon the representative to try their claims and no one is bound by a judgment in the suit. Therefore, there is no reason for ignoring the would-be-representative's lack of a viable claim in determining whether to certify the class. *See Rodriguez, Id.*

The courts in *Sosna* and *Franks* were concerned with more than a metaphysical proposition when they concluded that certification bestows a "legal status" upon the class apart from the interest asserted by the representative. *See Sosna, supra,* 419 U.S. at 399 n. 8, 95 S.Ct. at 557. It does not suffice that such a certification *would have been* accorded but for some error; it was not; hence, there is no reliance by class members to

consider. In *Kremens v. Bartley,* 1977, 431 U.S. 119, 132-133, 97 S.Ct. 1709, 1717, 52 L.Ed.2d 184, the Supreme Court specifically stated, "[I]t is only a 'properly certified' class that may succeed to the adversary position of a named representative whose claim becomes moot." In *Board of School Commissioners of City of Indianapolis v. Jacobs,* 1975, 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74, where the plaintiffs' claim had become moot during the appellate process, and the district court had neither defined nor certified the class, the Supreme Court considered itself compelled to dismiss the case. *See Walker v. World Tire Corp., Inc.,* 8 Cir. 1977, 563 F.2d 918; *Kuahulu v. Employers Ins. of Wausau,* 9 Cir. 1977, 557 F.2d 1334, where the courts, faced with facts similar in all relevant respects to those presented here, dismissed the appeals as moot. *See also Pasadena City Board of Education v. Spangler,* 1976, 427 U.S. 424, 430, 96 S.Ct. 2697, 2702, 49 L.Ed.2d 599; *Baxter v. Palmigiano,* 1976, 425 U.S. 308, 310 n. 1, 96 S.Ct. 1551, 1554, 47 L.Ed.2d 810; *Vun Cannon v. Breed,* 9 Cir. 1977, 565 F.2d 1096, 1098; *Winokur v. Bell Federal Sav. & Loan Ass'n,* 7 Cir. 1977, 560 F.2d 271, 277; *Lasky v. Quinlan,* 2 Cir. 1977, 558 F.2d 1133, 1137; *Boyd v. Justices of Sp. Term,* 2 Cir. 1976, 546 F.2d 526, 527; *Napier v. Gertrude,* 10 Cir. 1976, 542 F.2d 825, *cert. denied,* 1977, 429 U.S. 1049, 97 S.Ct. 759, 50 L.Ed.2d 765. *Compare Walker v. Hughes,* 6 Cir. 1977, 558 F.2d 1247, 1249 n. 2; *McGill v. Parsons,* 5 Cir. 1976, 532 F.2d 484, 488.

[11, 12] The court in *Kuahulu* stressed, as we must here, that its holding is "very narrow." The application of the mootness doctrine in the class action context "to a large extent, depends on the idiosyncrasies of

each case," *Kuahulu, supra,* at 1337. *Accord, Franks, supra,* 424 U.S. at 755, 96 S.Ct. at 1260. Here the district court has never adequately considered the certification issue. Our decision here, like decisions in *Jacobs, supra; Walker v. World Tire, supra;* and *Kuahulu, supra,* "does not require an automatic dismissal in every case where the district court has failed to certify the class before the representative's claim has become moot," *Kuahulu, supra,* at 1337. *See Geraghty v. U.S. Parole Comm.,* 3 Cir. March 9, 1978, 579 F.2d 238. Conversely, dismissal may be required in some cases where certification preceded the mootness of the individual claim. *See Kremens, supra.*

[13] As the court in *Sosna* noted, "There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case. . . ." 419 U.S. at 402 n. 11, 95 S.Ct. at 559. *See also Weinstein v. Bradford,* 1975, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350; *Gerstein, supra; Vun Cannon, supra,* 565 F.2d at 1100 n. 6; *Gardner v. Westinghouse Broadcasting Co.,* 3 Cir. 1977, 559 F.2d 209, 215-219 (Seitz, J., concurring), aff'd, 1978, ____U.S.____, 98 S.Ct. 2451, 57 L.Ed.2d 364; *Basel v. Knebel,* 1977, 179 U.S.App.D.C. 209, 211, 551 F.2d 395, 397 n. 1; *Zurak v. Regan,* 2 Cir. 1977, 550 F.2d 86, 91-92, *cert. denied,* 1977, 433 U.S. 914, 97 S.Ct. 2988, 53 L.Ed.2d 1101; *So. Bell Tel. & Tel. Co. v. U.S.,* 5 Cir. 1976, 541 F.2d 1151, 1154-1155; *Frost v. Weinberger,* 2 Cir. 1975, 515 F.2d 57, 64, *cert. denied.* 1976,

424 U.S. 958, 96 S.Ct. 1435, 47 L.Ed.2d 364; *Cicchetti v. Lucey,* 1 Cir. 1975, 514 F.2d 362, 367.

[14] There is a distinction, too, from the case in which, after an appropriate certification hearing, the court, through no fault of the plaintiff, improperly denies certification and the plaintiff subsequently loses on the merits of his individual claim.[10] *See Geraghty, supra; see also Horn v. Associated Wholesale Grocers, Inc.,* 10 Cir. 1977, 555 F.2d 270, 276-277; *Donaldson v. Pillsbury Co., supra,* 554 F.2d at 831 n. 5, all allowing the class action to continue. *Compare Jacobs, supra; Vun Cannon, supra; Kuahulu, supra; Walker v. World Tire, supra; Inmates v. Owens,* 4 Cir. 1977, 561 F.2d 560,

10. Where the representative's claim becomes moot prior to the appellate decision, there are several reasons for allowing the class to continue if a hearing has been held and certification improperly denied by a court; these reasons are not present in this case. First, in those cases, a record has been made, hence any *post hoc* determination concerning the original maintainability of the class can be made without speculation. Second, if there is a hearing, plaintiff shares no responsibility for the court's error; whereas his failure to move for certification or for a hearing bears on the adequacy of his representation, *Rodriguez, supra,* 395 U.S. at 405, 97 S.Ct. at 1897; *see also Gore v. Turner,* 5 Cir. 1977, 563 F.2d 159, 166 n. 3. Because of the restrictions on interlocutory appeals from class certification denials, *see Coopers & Lybrand v. Livesay (and Livesay,)* 1978, __U.S.__, 98 S.Ct. 2454, 37 L.Ed.2d 351, and *Gardner v. Westinghouse Broadcasting Co.,* 1978, ____ U.S. ____, 98 S.Ct. 2451, 57 L.Ed.2d 364, the error of law by the trial court will go uncorrected if the case is dismissed when the representative's claim becomes moot. In the present case, the failure to provide a hearing may go uncorrcted, but plaintiff had the opportunity to avoid that error by timely seeking a hearing. Moreover, once certification was denied without a hearing, plaintiff had a meaningful opportunity to have the error corrected through an appropriate motion to reconsider addressed to the trial court. For these reasons, if the representative seeks a hearing but the court fails to provide one, the equities favor allowing, whenever Article III permits, either an immediate appeal from the denial of certification or belated certification, notwithstanding the intervening mootness of the named representative's claim.

562; *Banks v. Multi-Family Management, Inc.,* 4 Cir. 1977, 554 F.2d 127, 128-9; *Boyd v. Justices of Sp. Term, supra,* 546 F.2d at 527; *Napier, supra,* 542 F.2d at 827, where no adequate hearing was held or a determination was not made at all, and the putative class was not permitted to proceed. *But see Winokur, supra,* 560 F.2d at 277, where the court suggested that the denial of certification is fatal, even if erroneous, unless the named party maintains an interest in the controversy.

[15, 16] Moreover, there will also be situations such as those presented in our *en banc* decision in *Huff v. N. D. Cass Co. of Alabama,* 5 Cir. 1973, 485 F.2d 710, where we held that the trial court erred by determining at the outset of the litigation that the representative's claim was without merit, and by denying certification on that basis. *Id.* at 714-15.[11] We required that this error be remedied by a certification determination where plaintiff's nexus with the class could be assayed without regard to the lack of merit of his individual claim. It is a different matter to consider a valid judgment entered against the representative's individual claim after trial on the merits as

11. As this court noted in *Miller v. Mackey International, Inc.,* 5 Cir. 1971, 452 F.2d 424, 427, "The determination whether there is a proper class does not depend on the existence of a cause of action. A suit may be a proper class action, conforming to Rule 23, and still be dismissed for failure to state a cause of action." Hence, the merits of plaintiff's claim are irrelevant, but plaintiffs must nonetheless " 'possess the same interest and suffer the same injury' " as other class members. *Rodriguez, supra,* 395 U.S. at 403, 97 S.Ct. at 1896, and cases cited therein.

Hence, it is error to explore the merits of plaintiff's claim during the maintainability determination, but obviously the merits must be considered during the trial of plaintiff's claims, and, to the extent that judgment bears upon the adequacy of plaintiff's representation or his nexus to the claims asserted by the class, it does not violate the policy of *Mackey* and *Huff* to consider it in future certification determinations. *See Long v. Sapp, supra.*

one *factor* in determining whether she has a continuing nexus with the class. *See Long v. Sapp, supra; see also Napier v. Gertrude, supra.*

Whatever decision the district court should have reached in February, 1975, on the basis of appearances, Mrs. Satterwhite was not then and is not now an appropriate representative. As no other champion has come forward and as the uncertified class lacks the stake in the controversy that a previously certified class might possess under *Franks* and *Sosna* the class action must be dismissed.

III.

The result we reach is mandated by Rule 23(a)(4), F.R.C.P.; neither the equities nor concern for avoiding undue prejudice to the rights of putative class members militate in favor of another result.

[17] Mrs. Satterwhite has had her day in court with respect to her own claim. No putative class member has intervened for purposes of appealing the denial of certification, as she might have done even after entry of final judgment; *see United Airlines, Inc. v. McDonald,* 1977, 432 U.S. 385, 97 S.Ct. 2464, 53 L.Ed.2d 423, nor has any other class member sought to represent the class. No unnamed member of this as yet inchoate class has indicated that she has been aggrieved by the city's employment practices or that she would like to challenge those practices. See the panel opinion, 557 F.2d at 422.

[18, 19] The only basis for allowing new claims to be asserted under the banner of this case would be to ensure that putative members, who have never been formally included or bound by this litigation, and who have been

free to intervene or file their own claims, might be protected by the assertions made in their behalf. The statute of limitations is tolled for putative class members' individual claims from the date of the filing of the complaint until class certification is denied, and remains tolled as to those putative class members who intervene or who file individual claims, even after the denial of certification. *American Pipe & Construction Co. v. Utah,* 1974, 414 U.S. 538, 553-54, 94 S.Ct. 756, 766, 38 L.Ed.2d 713; *Eisen v. Carlisle & Jacquelin,* 1974, 417 U.S. 156, 176 n. 13, 94 S.Ct. 2140, 2152, 40 L.Ed.2d 732; *Haas v. Pittsburgh National Bank,* 3 Cir. 1975, 526 F.2d 1083, 1096-98. *See also United Airlines, Inc. v. McDonald, supra.* Additionally, if a trial court's decision that the class may not be maintained is reversed on appeal, the status of class members is to be determined from the time that suit was instituted. *Gelman v. Westinghouse Elec. Corp.,* 3 Cir. 1977, 556 F.2d 699, 701; *Esplin v. Hirschi,* 10 Cir. 1968, 402 F.2d 94, 101 n. 12, *cert. denied,* 1969, 394 U.S. 928, 89 S.Ct. 1194, 22 L.Ed.2d 459. *See generally* 3B Moore's Federal Practice ¶ 23.90(3).

Whether putative class members may also be insulated from a statute of limitation bar after the denial of certification has been affirmed need not be addressed here, *See Jimeniz v. Weinberger,* 7 Cir. 1975, 523 F.2d 689, 696, *cert. denied,* 1976, 427 U.S. 912, 96 S.Ct. 3200, 49 L.Ed.2d 1204, suggesting the statute might be tolled. *See generally* Note, 17 B.C.Ind. & Com. L. Rev. 915 (1976); Class Actions Under New Rule 23 and Federal Statutes of Limitation: A Study of Conflicting Rationale, 13 Vill.L.Rev. 370 (1968). Should someone come forward as some future date to present an individual or a class claim against the City of Greenville, that action will

be an appropriate one in which to consider the effect, if any, this suit had with respect to any plea that the statute of limitations has run, should that plea be made.

The grievances, if any, of these putative and unknown class members are, as far as this record is concerned, wholly conjectural; they do not provide an adequate basis for requiring the lower court to ponder the problems attendant on reviving a moribund suit.[12] *See Bradley v. Housing Authority of Kansas City, Mo.*, 8 Cir. 1975, 512 F.2d 626, 628. Hence, we are constrained to decide what the panel was "tempted" to conclude, 557 F.2d at 422: there is no controversy between the defendant and possible class members that may now properly be considered in this suit.

IV.

The class action accords beneficial results both to litigants and the public. Its virtues, when properly employed, have been the subject of extensive literature,[13] and the

12. If, on remand, the trial court certified the class and reached the merits, these decisions would lead to another appeal. If the trial court denied certification, then there might also be an appeal of that determination, which would be final for appeal purposes because it disposes of the case. Either route would depend upon requiring the trial court to put itself back hypothetically more than four years, and then having an appellate court assess the accuracy of the trial court's conjecture. Such speculation and such profligacy with judicial resources in determining what is at best suppositious is warranted neither by Rule 23 nor by the ends of justice.

13. *See, e. g.*, Ashe, The Class Action: Solution for the Seventies, 7 N. Eng. L. Rev. 1 (1971); Blecher, Is the Class Action Rule Doing the Job (Plaintiff's Viewpoint), 55 F.R.D. 365 (1972); Cappelletti, Vindicating the Public Interest through the Courts: A Comparatrist's Contribution, 25 Buffalo L. Rev. 643, 667-75 (1976); The Cost-Internalization Case for Class Actions, 21 Stan. L. Rev. 383 (1969); Federal Rules of Civil Procedure: Rule 23, The Class Action Device and Its Utilization, 22 U. Fla. L. Rev. 631 (1970); Ford, Federal Rule 23: A Device for Aiding the Small Claimant, 10 B. C. Ind. & Com. L. Rev. 501 (1969).

possible dangers that lurk in its misuse have also generated wide comment.[14]

[20] Class actions economize time and effort and prevent a multiplicity of suits, Advisory Committee's Note to Amended Rule 23, 1966, 39 F.R.D. 98, 102; deter mass wrong and fraud, *Parham v. Southwestern Bell Tel. Co.*, 8 Cir. 1970, 433 F.2d 421, 428; preserve the constitutional rights of broad classes of persons, *Jones v. Diamond*, 5 Cir. 1975, 519 F.2d 1090, 1097; provide a forum for the small claimant and the uninformed, *American Pipe & Constr. Co. v. Utah, supra*, 414 U.S. at 551-552, 94 S.Ct. at 765; *Samuel v. University of Pittsburgh*, 3 Cir. 1976, 538 F.2d 991, 997; protect the rights of those reluctant to file indivdual actions against defendants with whom they have continuing necessary relationships, *Haynes v. Logan Furniture Mart, Inc.*, 7 Cir. 1974, 503 F.2d 1161, 1164-1165; *Ste. Marie v. Eastern R. R. Ass'n*, S.D. N.Y 1976, 72 F.R.D. 443, 449; and enhance judical focus on broader public policy issues abstracted from individual factual idiosyncracies, *Watson v. Branch County Bank*, W.D. Mich. 1974, 380 F.Supp. 945, 957, *rev'd on other grounds*, 6 Cir. 1975, 516 F.2d 902. They are an essential part of the judicial arsenal for combatting racial and sexual discrimination, *Johnson v. Ga. Highway Express, Inc., supra; Pettway v. American Cast Iron Pipe*

14. *See, e. g.*, Becker, Introduction: Use and Abuse of Class Actions Under Amended Rule 23, 68 Nw. U. L. Rev. 991 (1974); Simon, Class Actions—Useful Tool or Engine of Destruction, 55 F.R.D. 375 (1972); Control of Class Action Abuses through Regulation of Communications, 4 Class Action Rep. 632 (1975); Welthers, Amended Rule 23: A Defendant's Point of View, 10 B. C. Ind. & Com. L. Rev. 515 (1969).

Co., 5 Cir. 1974, 494 F.2d 211, and, for this reason, the courts will respond with flexibility to such claims.

[21, 22] But the continued vitality of this "effacious jurisprudential tool," *Jones v. Diamond, id.*, depends upon compliance with the procedural requirements of Rule 23 and the constitutional mandates of Article III. If litigants are to achieve the benefits properly to be derived from class actions and abuse of the procedure is also to be prevented, the institution of a class action imposes both on counsel and the trial judge responsibilities not raised by individual civil litigation. It is the court's duty to determine "as soon as practicable" whether the action may be maintained as a class litigation. That duty, however, creates an obligation on counsel to assist by filing an appropriate motion supported by proper evidence. Although, in rare instances, maintainability may be determined on the basis of the pleadings, *Huff v. N. D. Cass Company of Alabama, supra,* 485 F.2d at 713, if there is any genuine doubt with respect to the propriety of a class action, a preliminary evidentiary hearing is essential. *See Walker, supra,* 563 F.2d at 921; *Jones v. Diamond, supra,* 519 F.2d at 1099. Because thinly manned trial courts are beset not only with crowded dockets but with mandates to accord conflicting priorities to innumerable matters,[15] the final determination of a civil suit may not be reached for months or even years. If, thereafter, an appeal from the class action decisions is taken, there is the difficult problem of attempting to ascertain the facts and circumstances that existed at the time of the original certification decision. These problems indeed

15. *See* Priorities for Handling Litigation in the United States Court of Appeals (Federal Judicial Center 1977). *See also* Report No. 109A, Reports with Recommendations to the House of Delegates, A.B.A. 1977 Midyear Meeting 211 (1977).

played a large part in the second panel decision to remand. 557 F.2d at 418-19, 423. Affording an initial hearing, even should the conclusion be that none was necessary, services to lend certainty and direction to the future course of the lawsuit.[16]

[23] Counsel for the class have the primary responsibility for pressing a class action claim. They do not satisfy their responsibilities by simply affixing the class action label to a suit and depositing it with the clerk. Counsel for the defendants in a class action will also better serve their clients and the court if they promptly assert appropriate defenses to maintenance of the suit as a class action, to the end not only that the trial court may have a full picture before it in making this determination, but also to present a complete record in the event of an appeal on the certification issue. The expense to the litigants in this case and the expenditure of judicial energy

16. Here, no hearing was held, and we have no record of the facts existing at the time certification was denied so as to facilitate an acurate *post hoc* determination. The problem presented here, and in *Jacobs, Kuahulu,* and *Walker v. World Tire* can be avoided simply by holding an appropriate hearing *re* maintainability and by issuing a timely certification decision. Because of the death knell on interlocutory appeals of certification decisions, *see Coopers & Lybrand v. Livesay and Livesay, supra* n. 10, and *Gardner v. Westinghouse Broadcasting Co., supra* note 10, the problem presented in *Horn* and *Donaldson,* where a hearing was held but certification erroneously denied, can be obviated only by the timely intervention of a putative class member, *United Airlines v. McDonald,* 1977, 432 U.S. 385, 97 S.Ct. 2464, 53 L.Ed.2d 423, or if the court allows the named representatives to raise the maintainability issue on appeal notwithstanding the loss on the merits, or compromise, of their individual claims. *See Geraghty, supra,* and note 10, *supra.* But the error cannot be corrected on appeal if there has been no certification hearing at which the facts necessary for adequate review have been determined; nor can relief be provided by the appellate court remanding for an evidentiary hearing when it has become apparent that the named representatives are not members of the class, hence the class, as proposed, may not be certified.

and thought devoted to the dismissal of this claim underline that it is critically important for both counsel and the court to accord to the preliminary procedural issues in class actions the uncompromising attention that they deserve.

Accordingly, we DISMISS the appeal, VACATE the panel opinion, and REMAND to the district court with instructions to vacate its order and dismiss the complaint.

GODBOLD, Circuit Judge, dissenting, with whom BROWN, Chief Judge, and GOLDBERG and SIMPSON, Circuit Judges, join, dissenting.

The second opinion of the panel responded to the City's petition for rehearing, which had raised the claim that the first panel decision violated the case or controversy requirement of Article III of the United States Constitution. Case or controversy was the issue on which the panel divided in its second opinion. The court en banc has pretermitted decision on case or controversy grounds and instead has reversed the panel on Rule 23 grounds. Thus case or controversy as a ground for decision is out of the case.

The en banc opinion describes its holding as very narrow and recognizes that application of the mootness doctrine depends to a large extent upon the idosyncrasies of each class action. The opinion affirmatively recognizes that this decision does not require automatic dismissal in every case when the district court has failed to certify the class before the representative's claim has been mooted. It distinguishes this case from those in which after an appropriate certification hearing the court, through no fault of the plaintiff, improperly denies certification and the plaintiff subsequently loses on the merits of his individual claim. With the decision resting upon Rule 23, and with a clear statement of what this decision does and does not hold, the difference of views have been greatly narrowed.

Viewing the case even within the narrow limits set by the en banc court, the decision and opinion seem to me a grudging application of class action concepts, at odds with the protections normally accorded class members from adverse consequences and based upon a misapplication of *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977).

In a variety of contexts the courts have protected absent class members from the fallout inevitably arising from the two-headed nature of the class action. One type of fallout arises because the members of the putative class, and of the class when certified, have interests which are affected while the suit is ongoing—should they file claims with EEOC, or protective suits; is the statute of limitations running;[1] over what period can they claim back pay in the suit or independently of the suit; should they retain their own counsel? How does the court protect these ongoing interests of the class when the plaintiff's individual claim aborts, in a manner fair to the defendant as well and without imposing undue strain on the court system? From hindsight, we might well have chosen a per se rule. Rather we have tried to thread our way through varying circumstances with a balancing of interests approach. The balance has gone badly askew in this case.

1. The en banc opinion pretermits this issue for a future case.

In this connection, it is important to recall that the panel did not hold that the case should go forward as a class action or that Mrs. Satterwhite should remain as class representative. Rather it remanded to the district court, which had improperly derailed the case, for that court to reexamine the situation and, if appropriate, set the train back on the rails with Mrs. Satterwhite or a successor as representative. The court en banc elects to leave the wreckage where it is and to say "tough luck" to the putative class members.

Approaching application of the mootness doctrine as a case-by-case matter, the opinion in Part I seeks to bring this case within *Rodriguez*. In *Rodriguez* plaintiffs alleged a class action but never moved for certification, and the court made no ruling on certification. Plaintiffs stipulated before trial that the only issue was failure of defendants to consider plaintiffs' applications. At trial plaintiffs confined their evidence and argument to individual claims, and the defendants responded accordingly. After trial the court dismissed the class claims setting out the events just outlined, plus the fact that a large segment of the putative class had recently rejected a bargaining proposal for a remedy sought in the class action complaint. The court also ruled against plaintiffs on their individual claims. On appeal this court certified a class, designated plaintiffs as the representatives and granted relief. The Supreme Court held that the district court had not erred in dismissing the class claims. This is not surprising.

This case cannot be fairly equated with *Rodriguez*. The only resemblance is that plaintiffs in both cases lost on their individual claims. *Rodriguez* was never a bona

fide class suit, and everything the plaintiffs did after filing their complaint was inconsistent with the interests of the class. The present suit was prosecuted as a class action from the beginning until after the district court denied certification (even including an abortive appeal to this court).[2]

Also, *Rodriguez* must be read in the light of two recent decisions, *Coopers & Lybrand v. Livesay*, ____ U.S.____, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978), and *Gardner v. Westinghouse Broadcasting Co.*, ____U.S. ____, 98 S.Ct. 2451, 57 L.Ed.2d 364 (1978). *Coopers & Lybrand* holds that a district court order denying certification is not appealable as a final order under 28 U.S.C. § 1291. The Court predicates its holding on the fact that "an order denying class certification is subject to effective review at the behest of the named plaintiff or intervening class members." Similarly, *Gardner* assumes that "If after [a] judgment on the merits, the relief granted is unsatisfactory, the question of class status is fully reviewable." These two cases, which foreclose interim review of denials of certification, are predicated upon the concept that full and effective review is available after a final judgment on the merits. They are inconsistent with a mechanistic extension of *Rodriguez* that uses the merits determination as a sword against the class members who are required to wait for the merits before getting review.

The majority assert that Mrs. Satterwhite is like the plaintiffs in *Rodriguez* in that she never had any nexus

2. Mrs. Satterwhite sought to appeal from the denial of certification, but, faced with unreviewability, withdrew the appeal.

or homogeneity of interest with the class.[3] Mrs. Satterwhite sought to represent a class composed of all present and prospective female employees of the city allegedly victimized by (1) a discriminatory hiring policy, (2) sexually segregated job classifications, and (3) a discriminatory compensation scheme. She is exactly within (1), for she is a female, a prospective employee, and a person who claimed she didn't get the job she applied for because the city has a policy against hiring females. In short, she asserts sex discrimination in hiring, job assignment and pay, directed against females, on behalf of applicants and of those already employed.[4] In *Carr v. Conoco Plastics, Inc.*, 423 F.2d 57 (CA5), *cert. denied*, 400 U.S. 951, 91 S.Ct. 241, 27 L.Ed.2d 257 (1970), we permitted a black job applicant to represent black applicants and employees in seeking relief against discrimination in hiring and in internal operation of the plant. It is only when it is decided that her claim is without merit—i.e., she was denied employment because of an adverse interest and not because of a policy against hiring females—that Mrs. Satterwhite loses her connection with the class. Arguably she is also within (2).

This case falls somewhere between *Rodriguez* where the case was never prosecuted as a class suit and plaintiffs' actions after filing the complaint were antithetical to a

3. This position is necessary to the opinion because of our case-law, recognized somewhat gingerly in the opinion, that the court should not, early in the litigation, dismiss the class claims because the individual plaintiff's claim lacks merit, if the plaintiff enjoys suffcient nexus or connexity with the class apart from the lack of merit. *Huff v. N. D. Cass Co. of Alabama*, 485 F.2d 710 (C.A. 5, 1973) (en banc.)

4. I would characterize this as "across-the-board" but my position does not depend on that label.

class suit, and the "different case" postulated in footnote 12 of *Rodriguez*, 431 U.S. at 406, 97 S.Ct. at 1897, 52 L.Ed.2d at 463, where a class has been certified and the class claims tried and only then does it appear that the plaintiff is an inappropriate class member. The Court would not apply the mootness doctrine to this "different case." Here, the class has not been certified or the class claims tried as in the "different case," not because of lack of assertion of a bona fide class case or failure of the plaintiff or adverse interest of plaintiff, as in *Rodriguez*, but because of trial court error.[5] To try to edge this case over toward *Rodriguez*, the opinion emphasizes that Mrs. Satterwhite did not ask for a hearing on the certification issue and presented to the court no evidence on that issue except a computer printout. This is considerably less than all the story. After filing her class action Mrs. Satterwhite filed searching interrogatories to the city addressed to the handling of job applications, the numbers of female and male employees and their duties, pay, and the like, and other data material to the various prongs of the class claims. The city refused to answer and tendered its records for examination by plaintiff. Plaintiff filed a motion to compel answers and asked for an immediate hearing. She filed a motion for certification of the class accompanied by a brief, as directed by the court, on the question whether certification should be denied on the ground her individual claim lacked merit. The city responded with a brief urging as one of the grounds for denial of certification that Mrs. Satterwhite's claim lacked merit. The court, without setting a hearing on the motion for certification, which it was required to do, or a hearing on

5. As I discuss below, the defendant urged that certification be denied on the ground that Mrs. Satterwhite's claim lacked merit.

the motion to compel answers, denied certification.[6] There was a paucity of evidence made available to the court on the class claims, but plaintiff had unsuccessfully sought the aid of the court to obtain more. Seven weeks before trial the court denied certification without statement of reasons. Plaintiff sought to appeal from the order, but faced with the "death knell" limitation, then the law in this circuit, withdrew the appeal.

In these circumstances neither policy of requiring diligence by the class representative nor a neutral policy of protecting the adjudicatory system justifies our refusing to recognize the interests of the class. The opinion of the court suggests that remand to the district court for it to consider maintainability, case or controversy, and whether Mrs. Satterwhite or some successor should be class representative, should be denied because of inconvenience to the district court and the litigants. In the circumstances this is disingenuous. The court erred by acting too soon, acting without a hearing, and, one may fairly infer, for the wrong reasons, and the only litigant inconvenienced is the city, which urged the wrong reason upon the court. The consequences should not be visited upon the putative class, without an opportunity, through remand, for the interests of the putative class to be protected.

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6. The opinion, in footnote 7, recognizes that it is the duty of the court, without a motion from plaintiff, to conduct a hearing on certification, but nevertheless it marks up a demerit against plaintiff for not asking the court to carry out its duty. Moreover, plaintiff might reasonably infer that since she had pending one motion for a hearing she need not ask for two hearings.

Supreme Court, U. S.
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IN THE

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Petitioners,

v.

CITY OF GREENVILLE, TEXAS,
Respondent.

RESPONDENT CITY OF GREENVILLE, TEXAS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Respondent, the City of Greenville, Texas, respectfully submits its response to the application for Writ of Certiorari to the United States Court of Civil Appeals for the Fifth Circuit.

SUMMARY OF ARGUMENT

The petition for Writ of Certiorari should be denied for at least two reasons. First, the opinion of the Court of Appeals is in conformity with the opinions of this Court,

and indeed the result obtained was mandated by this Court's opinion in *East Texas Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395 (1977). This Court therein refused to permit certification of a class after it had been judicially determined that the representative was not a member of the putative class — which was the identical result reached by the Fifth Circuit Court of Appeals and which result is sought to be overturned by the requested writ.

Secondly, while there may be some conflict within the circuits as to what to do with an uncertified class whose purported representatives have been judicially determined to not be members of the class, there is no conflict as to whether the relief which Petitioner seeks is available to her. Petitioner seeks here — and sought below — a hearing on the question of whether or not to certify a class with herself as the class representative; all of the Courts of Appeals who have spoken are in agreement that this relief should be denied.

ARGUMENT

THE RESULT REACHED BY THE COURT OF APPEALS IS IN ACCORD WITH PRIOR DECISIONS OF THIS COURT

Far from conflicting with the opinions of this Court, the action taken by the Court of Appeals is in accord with and is mandated by the opinion of this Court in *East Texas Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395 (1977). The single most important fact now known is that Minda Satterwhite was not a victim of discriminatory practices by the City of Greenville, Texas. She is the one person who has been judicially determined not to be a member of the class she seeks to represent. She is, therefore, not

a proper class representative under Fed. Rule Civ. Pro. 23(a). This case now stands in the same factual setting as *Rodriguez* stood when reviewed by the appellate courts: there no class had been certified and the named plaintiffs, after trial, had been determined to have not been victims of discrimination. This Court held in *Rodriguez* that where no class had been certified and where the named plaintiffs' claims had been found to be meritless, those plaintiffs could not be class representatives, for "a class representative must be a part of the class and 'possess the same interest and suffer the same injury' as the class members." 431 U.S. at 403. Paraphrasing *Rodriguez,*

> [Minda Satterwhite] could have suffered no injury as a result of the alleged discriminatory practices, and [was] therefore, not eligible to represent a class of persons who did allegedly suffer injury.

The *Rodriguez* opinion indicates that the time to look at the question of whether the named plaintiff is a proper class representative is at the time of class certification — based on all of the facts known to the court at the time of that certification. Class certification in this case cannot happen yesterday or the day before or on February 4, 1975. It can only happen in the future. At that point, the court will know — as it has already determined — that Minda Satterwhite is not a proper class representative.

Plaintiff claims that the opinion of the Court of Appeals conflicts with this Court's opinions in *Coopers and Lybrand v. Livesay,* _____ U.S. _____, 57 L.Ed.2d 351 (1978) and *Gardner v. Westinghouse Broadcasting Co.,* _____ U.S. _____, 57 L.Ed 2d 364 (1978). Those cases hold that a district court order denying class certification is not appealable as a final order, but rather may be reviewed only after judgment on the merits. Those cases did not purport to and did not overrule *Rodriguez.* This Court in

Coopers & Lybrand held "that the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not sufficient reason for considering it a 'final decision' within the meaning of § 1291" 57 L.Ed.2d at 363. Likewise the fact that a district court may have acted prematurely in denying class certification is not sufficient reason for holding a hearing on class certification after the district court's action is vindicated by a judgment against the individual plaintiff. Just as denial of class certification cannot preempt 8 U.S.C. § 1291, it cannot eviscerate Rule 23(a).

In any event, the Court of Appeals' opinion below did not say that the district court's order denying class certification in this matter was not reviewable on appeal. It simply held that no class could now be certified with Minda Satterwhite as the class representative. There being no other class representatives available, it was ordered that the case be dismissed.

THE COURTS OF APPEALS ARE IN AGREEMENT THAT THE RELIEF PETITIONER SEEKS IS NOT AVAILABLE

The second important point is that there is no conflict among the Courts of Appeals as to whether the relief which the petitioner would seek from this Court and for which she prayed in the Court of Appeals is available. The relief which the petitioner seeks and has always sought is a hearing on the maintainability of this action as a class action with the petitioner as a class representative. The Court of Appeals for the Fourth Circuit in *Goodman v. Schlesinger,* 584 F.2d 1325 (1978) would not have granted such relief to petitioner. In that case, the opinion remanded the cause to the district court to hold on its docket for a reasonable time in order to let some other potential class

representative step forward to pursue the action. It did not remand the case to the district court to conduct a hearing on the question of whether a class action could be maintained with the plaintiff who had been judicially determined not to be a member of the class as a representative. The remedy fashioned in *Goodman* is a remedy which petitioner has not sought below and does not seek here. The petitioner seeks to be the class representative. That is a result which the opinions of this Court do not condone, and a result which no opinion of any Court of Appeals permits.

The interesting question as to whether there can be a cause on the docket of a federal district court in which there is a known defendant and a known allegation but no known plaintiff has thus not arisen here. That is the question upon which there may be disagreement between the Fifth and Fourth Circuit Courts of Appeals (with the Sixth and Ninth Circuits siding with the Fifth, see *Shipp v. Memphis Area Office, Tennessee Department of Employment Security,* ____ F.2d ____, 14 Empl. Prac. Dec. ¶8520 (6th Cir. 1978) and *Vun Cannon v. Breed,* 565 F.2d 1096 (9th Cir. 1977)). The Court of Appeals for the Fourth Circuit seems to think this is a permissible status for a case. If this question had presented itself in this case, we would urge that such a proposition is contrary to the limitation in Article III of the United States Constitution that the federal judicial power extend only to cases or controversies: A case with no plaintiff is no case; a controversy between no one and someone is no controversy. *Vun Cannon v. Breed,* 565 F.2d 1096 (9th Cir. 1977). However, that question is not present in this case.

PRAYER

In light of the fact that the Court of Appeals was correct in its determination; in light of the fact that the Court of Appeals' decision is in accord with — and mandated by — previous decisions of this Court; in light of the fact that the Courts of Appeal are in agreement on the point that the relief which the Petitioner seeks and has sought below is not available to her, Respondent prays that the petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed by Minda Satterwhite be denied.

Respectfully submitted,

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& Blumenthal
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CERTIFICATE OF SERVICE

I, John Andrew Martin, hereby certify that three (3) true and correct copies of the foregoing have been on this the 12th day of January, 1979, deposited in the United States Mail, first class, postage prepaid, to Larry R. Daves, Daves, McCabe & Crews, P. O. Box 1115, Tyler, Texas, 75710, attorney for petitioner.

All parties required to be served have been served.

JOHN ANDREW MARTIN